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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. A-440

STUCKEY'S STORES, INC., a Delaware Corporation, individually and as a Representative on behalf of its Franchisees in the State of New Mexico,

Appellant,

v.

FRED O'CHESKY, Chief Highway Administrator, State Highway Department,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. A-440

STUCKEY'S STORES, INC., a Delaware Corporation, individually and as a Representative on behalf of its Franchisees in the State of New Mexico,

Appellant,

v.

FRED O'CHESKY, Chief Highway Administrator, State Highway Department,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

JURISDICTIONAL STATEMENT

Stuckey's Stores, Inc., appeals from the decision of the Supreme Court of New Mexico, dated August 6, 1979, holding that the New Mexico Highway Beautification Act did not, as applied in this case, violate the free speech clause of the First Amendment to the United States Constitution.

OPINIONS BELOW

The opinion of the Supreme Court of New Mexico appears in the appendix herein, p. 1a, *infra*. The opinion is also reported at ___ N.M. ___, 600 P.2d 258.

JURISDICTION

The decision of the Supreme Court of New Mexico was filed on August 6, 1979. See p. 1a, *infra*. A timely motion for rehearing was denied on September 11, 1979. See p. 31a, *infra*. Within ninety days of the denial of rehearing, on November 19, 1979, a notice of appeal was filed in the New Mexico Supreme Court. See p. 32a, *infra*. On November 23, 1979, Justice Byron R. White granted an extension of time to docket the appeal to and including February 8, 1980.

Jurisdiction in this Court is invoked under 28 U.S.C. Sec. 1257(2). Cases which are believed to sustain the jurisdiction of this Court are *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

QUESTION PRESENTED

Whether, because the New Mexico Highway Beautification Act prohibits effective advertising by appellant's and its franchisees' roadside businesses in rural areas along interstate and primary highways and is not justified by the rationales offered to sustain it, the Act is an unconstitutional abridgment of appellant's and the traveling public's First Amendment rights.

CONSTITUTIONAL, STATUTORY & REGULATORY PROVISIONS INVOLVED

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech . . . .

New Mexico Statutes Annotated, Section 67-12-4A (1978):

A. No outdoor advertising shall be erected or maintained except:

(1) directional and other official signs and notices authorized or required by law, including, but not limited to, signs and notices pertaining to houses of worship, natural wonders and scenic and historic attractions;

(2) signs, displays and devices advertising the sale or lease of property upon which they are located;

(3) signs, displays and devices advertising activities conducted on the property upon which they are located, provided that the bisection of a parcel of land by a highway right-of-way acquisition shall not in itself be construed as converting the property into more than one parcel;

(4) signs, displays and devices located in areas which are zoned as industrial or commercial under authority of law;

(5) signs, displays and devices located within six hundred sixty feet of the nearest edge of the right-of-way, in unzoned industrial or commercial areas as defined by regulations promulgated by the commission, provided that no area shall be considered to be an unzoned commercial or industrial area unless and until a regulation defining the area

as unzoned commercial or industrial is promulgated by the commission; and

(6) signs lawfully in existence on October 22, 1965, determined by the state highway commission, subject to any necessary federal approval, to be landmark signs of historic or artistic significance worthy of preservation including signs on farm structures or natural surfaces.

Article 1050.00(29) of New Mexico Outdoor Advertising Rules and Regulations:

"Unzoned commercial or industrial area" means any unzoned lands upon which there is located a bona fide commercial or industrial activity operating for at least six (6) continuous months of the year with a valid 12 months business license issued by a city, county or the state, whether or not a permanent structure is located thereon, and the area along the highway extending outward 1,000 feet from and beyond the edge of such commercial or industrial activity and extending perpendicular from the center line to a depth of 660 feet from the nearest edge of the right-of-way line on the same side of the highway as the commercial or industrial activity.

Article 1055.01 of New Mexico Outdoor Advertising Rules and Regulations:

Outside of incorporated villages and cities, no sign structure shall be placed within 500 feet of an interchange, or an intersection at grade, or a safety roadside rest area or any portion of an interstate or primary highway which is a limited access highway. Said 500 feet to be measured along the interstate or limited access primary highway from the beginning or ending of the pavement widening at the exit from or entrance to the main-traveled way.

23 U.S.C. Sec. 131(b):

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

STATEMENT OF THE CASE

Appellant filed an action for declaratory judgment against the appellee in the District Court for the First Judicial District, Santa Fe County, New Mexico. The action was filed on August 9, 1976, the day on which appellee had announced that the State Highway Department would destroy appellant's outdoor advertising signs. The action sought a declaration that the New Mexico Highway Beautification Act was unconstitutional because it violated the First and Fourteenth Amendments to the United States Constitution. A preliminary injunction was issued preventing the destruction of the signs. After a three-day bench trial, the trial court entered judgment against appellant. A timely appeal was taken to the New Mexico Supreme Court. On appeal, the New Mexico Supreme Court reversed the lower court as to the destruction of some signs without compensation because of errors under state law, but as to all other signs the Court affirmed the lower court judgment.

At the trial, evidence was introduced and the court found that appellant's stores sell gasoline, motor vehicle products, food and sundries to motorists using the New Mexico interstate and primary highways. Each of appellant's and its franchisees' stores are in rural areas a substantial distance from the nearest town. Eighty percent of appellant's customers are out-of-state passenger car motorists and fifteen percent are motorists from a part of New Mexico other than the area in which the store is located. These potential patrons are unaware of the locations of appellant's stores unless they are so informed by means of individual outdoor advertisements. The evidence and findings also showed that the traveling public has a strong interest in the availability of outdoor

advertising for roadside businesses offering services such as appellant's.

Appellant's outdoor advertising consists of a series of signs placed on private land along the roadside. The sign most distant from the store is placed on the far side of the town(s) nearest to the store. This sign is to inform the motorist of appellant's location and services so that he may choose the greater convenience of appellant's multiple services and proceed past the town which is shown on road maps and state highway signs sanctioned by the Act. In addition, other signs are placed at distances from the stores which will allow the motorist three to five minutes to decide if he wishes to stop. These distances range from 2.75 to 4.6 miles based on a 55 mile-per-hour speed limit. The evidence was that this time was the minimum necessary for the motorist to decide to stop and to turn off the exit ramp.

The evidence showed that the roadside sign program is appellant's only effective means of advertising and the trial court found that all advertising media other than signs do not afford appellant and its franchisees an adequate or feasible means of informing customers of appellant's locations and services. In addition, the uncontradicted evidence was that the elimination of roadside signs other than on-premise has had a devastating effect on roadside businesses such as appellant's.

Of the six exceptions to absolute prohibition of outdoor advertising under the Act, only three are ostensibly available to appellant. See N.M. Stat. Ann. Sec. 67-12-4A(3)(4)(5) (1978). However, the uncontradicted evidence was that only two places in New Mexico had been zoned commercial or industrial and that none of the signs involved in this suit are located in either location. In addition, the testimony concerning an unzoned commercial or industrial area, wherein an exception in

the Act allows a sign to be placed 1000 feet beyond the immediate premises, showed that there can be no such placement in fact because of another regulation which prohibits placement of signs within 500 feet of the beginning of exit ramps which are themselves located more than 500 feet from the interchange where the stores are situated. The only real exception, the on-premise sign, was demonstrated to be effectively useless as a means of communication because a highway traveler has almost passed the exit ramp before the on-premise sign comes into view.

There was also testimony concerning the logo program which is sanctioned by the Federal government, not state law. This program applies only to interstate highways and involves placing a company's trademark on a sign headed with a generic identification of certain services. For example, one-half mile before an intersection there will be a large sign which says, "GAS". On this sign only the four gasoline stations closest to the interchange may place their logo, such as "Gulf". All others are excluded. Similarly, there are logo signs for motels and food. However, the logo program prohibits price advertising which the evidence demonstrated the public demands, particularly concerning gasoline. Four of the ten Stuckey's stores in New Mexico qualified to be in the logo program though none of the generic signs had been installed as of the trial date. The uncontradicted evidence showed that, based on the Stuckey's experience in Oregon, the logo program was an inadequate substitute for roadside advertising. The logo program is not available to roadside businesses along the primary highways and is especially ineffective for small businesses without a recognizable logo. Moreover, the State did not assert and the trial court did not find that the logo program provides an ample alternative means of advertising.

Throughout the trial, the State declined to introduce any evidence pertaining to the First Amendment claim. Its position was that because the preamble to the Act recited police power purposes, the State was not obliged to factually demonstrate the alleged governmental interests for which the Act was passed. In fact, the trial court found upon the evidence that no signs had been removed in New Mexico to enhance scenic beauty or to protect the public health, safety, welfare, convenience or enjoyment or the public investment in public highways, though it also found without evidentiary support that the regulatory scheme "tends to promote the stated purposes of the Act."

Furthermore, the State made no attempt to show that the alleged governmental interests outweighed the appellant's and the traveling public's demonstrated First Amendment interests and made no attempt to show that the purported alternative means allowed by the Act and the logo program were adequate to satisfy the appellant's and the traveling public's needs.

On appeal, the New Mexico Supreme Court ignored the trial court's findings on the appellant's and traveling public's strong First Amendment interests. The New Mexico Supreme Court ignored the utter lack of evidence pertaining to the alleged governmental interests served by the Act and engaged in pure speculation as to the factual bases upon which it could be upheld. The New Mexico Supreme Court refused to weigh appellant's demonstrated interests against the government's hypothetical interests. The New Mexico Supreme Court ignored the uncontradicted evidence that the only real available advertising means, an on-premise sign, was wholly inadequate to meet appellant's needs.

PRESENTATION OF FEDERAL QUESTION

The complaint in this case challenged the federal constitutionality of the statute. The pre-trial order recited the appellant's claim that the New Mexico Highway Beautification Act denied appellant's freedom of speech under the First Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment.

In the trial brief, appellant argued that the Act violates the First Amendment. The appellant's requested findings of fact and conclusions of law included requested facts which supported its First Amendment claim and a requested conclusion which stated that the Act violated the First Amendment because it so severely limited the only timely, adequate, effective and feasible means by which Stuckey's Stores, Inc., and its franchisees, could communicate to their potential customers information as to the locations of Stuckey's stores and as to the goods, services, conveniences and facilities necessary and convenient to such customers. This requested conclusion was denied.

On appeal the appellant argued that the Act abridged appellant's freedom of speech in violation of the First and Fourteenth Amendments to the United States Constitution. The opinion of the New Mexico Supreme Court addressed this issue and rejected appellant's claim. The motion for rehearing filed by appellant addressed itself to the complete lack of evidence necessary to support the findings which denied appellant's First Amendment claim and to the New Mexico Supreme Court's refusal to apply the proper standards in ruling on appellant's First Amendment claim.

THE QUESTION IS SUBSTANTIAL

Beginning with *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973), this Court recognized that even commercial speech could be protected by the First Amendment. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), this Court made it clear that commercial speech could not be prohibited without assessing the First Amendment interest at stake and weighing it against the alleged governmental interest served by the regulation. In *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), free speech protection was accorded communication of information which is purely commercial. That the speaker is offering his products or services for economic gain does not disqualify his expression from protection by the First Amendment. *Id.* at 762. Further, the consumer's interest in receiving the information may be as "keen" as his interest in receiving political information. *Id.* at 763.

Of course, the government is not absolutely prevented from regulating speech; however, the power to restrict cannot be exercised in the absence of demonstrated paramount or significant governmental interests. The determination of whether such an interest exists requires a factual basis and a balancing of the individual's interest in free expression against the State's asserted interest. A Court cannot escape making this assessment. *Bigelow, supra* at 826. Moreover, the State must show that its interests outweigh the individual interests. *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 95 (1977).

Specifically with regard to time, place and manner regulations, this Court has set forth the appropriate standards for measuring their constitutionality. In *Virginia Pharmacy Board*, the Court stated:

> We have often approved restrictions of that kind [time, place, and manner] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.
>
> 425 U.S. at 771.

See also, Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972). This Court's later decision in *Linmark Associates* makes it clear that the alternatives must be real alternatives and not hypothetical alternatives which will not in fact convey the information to potential customers. 431 U.S. at 93.

Throughout the trial the appellee relied upon the presumption of constitutionality which is normally accorded a state statute under due process and equal protection challenges when no countervailing fundamental interest is at stake. The appellee introduced no evidence which would tend to show that alleged interests of the State actually existed or were enhanced by the regulations or which would show that the magnitude of such interests outweigh the appellant's interests in free expression of commercial ideas. In short, the appellee did no more than to assert that the governmental interests recited in the preamble to the Act were *ipso facto* justifications therefor and were not subject to factual inquiry. The stance assumed below by the State, which was ratified by the New Mexico Supreme Court, is completely contrary to this Court's rulings under the First Amendment.

This Court has always recognized that when a government regulation impinges on free speech the government

carries the burden of justifying the regulation. For example, in *Virginia Pharmacy Board,* it held:

> [T]he justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is.
>
> 425 U.S. at 770.

In *Linmark Associates, Inc.,* it further stated: "After *Virginia Pharmacy Bd.* it is clear that commercial speech cannot be banned because of an unsubstantial belief that its impact is 'detrimental.'" 431 U.S. at 92, n.6. Also, in *Carey v. Population Services International,* 431 U.S. 678, 696 (1977), Mr. Justice Brennan reiterated:

> . . . [W]hen a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.

Ignoring this fundamental proposition, the appellee asserted and the New Mexico Supreme Court embraced an unjustifiable presumption that the mentioned interests of the State existed. Further, by necessary implication, the Court found them to be of significant stature. Consideration of the specific interests adopted by the New Mexico Supreme Court to uphold the Act, promotion of aesthetics and an economic interest in Federal highway funds, demonstrate the speciousness of each in comparison to the appellant's interests in free expression.

There is no support in the evidence or findings for the Supreme Court's assertion that the Act promotes aesthetics. The Act does not apply to 94.4% of the

roads in New Mexico which the trial court found to be at least as beautiful as the roads covered by the Act. It also found that no outdoor advertising has been eliminated in New Mexico to enhance scenic beauty. Moreover, the Act does nothing to control size, color or design of signs.[1] In *Virginia Pharmacy Board* this Court noted that there were methods by which the State could directly control the quality of pharmacists without prohibiting the advertising of drug prices. Similarly, New Mexico could control the quality and number of roadside signs without prohibiting their effective existence. In *Linmark Associates* the absence of control on all signs or on shape or size of sign rendered the ordinance incapable of promoting aesthetic values. 431 U.S. at 93. The same must be said of the New Mexico Act.

The only justification left for the Act under the New Mexico Supreme Court's opinion is the State's interest in not losing 10% of the federal monies available to it because of failure to comply with the Highway Beautification Act. This Court has often noted that individual interests protected by the Constitution cannot be abridged to save the State money. *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Vlandis v. Kline,* 412 U.S. 441 (1973); *Stanley v. Illinois,* 405 U.S. 645 (1972); *United States Department of Agriculture v. Murry,* 413 U.S. 503 (1973); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974). *See also Putney v. Township of*

[1] In 1978 the Highway Department did adopt rules and regulations governing the size of signs. Such rules were not in effect until October 19, 1978, and were not an issue in the trial of this cause. There are still no regulations governing design.

Abington, 176 Pa. Super. 463, 108 A.2d 134, 137 (1954). *Cf. Reed v. Reed,* 404 U.S. 71 (1971).

More importantly, there was no contention or showing before the trial or Supreme Court that New Mexico would in fact lose 10% of its federal monies if the Act were declared unconstitutional. The defect in the Act could be cured by simply defining an unzoned industrial or commercial area in a meaningful manner so as not to wipe out appellant's First Amendment interests.

Besides resting its decision on governmental interests which were never claimed nor shown to exist, the New Mexico Supreme Court rested its conclusions as to adequate available alternatives on a presumption not sanctioned by law. The use of such presumption is contrary to this Court's reasoning in *Linmark Associates.* Even though the realtors wishing to sell houses in Willingboro could have advertised in the newspaper and with leaflets, the restriction on yard signs was invalid. The so-called alternatives were more costly, required more work, and would not reach all potential customers. In short, the alternatives were "less effective." 431 U.S. at 93.

Furthermore, the adequate alternatives presumption created by the New Mexico Supreme Court was flatly contradicted by undisputed evidence below. The only evidence regarding these "alternatives" was that the severe restriction of outdoor advertising signs in New Mexico has caused a significant decrease in revenues. The only evidence below was that in other states, where outdoor advertising signs had been replaced by similar alternatives, revenues decreased. The undisputed evidence also showed that those stores not located on an interstate system did not, by definition, qualify for the logo program and that the logo program is ineffective. The evidence below was

that there were only two small places in the state with comprehensive zoning of commercial or industrial areas, and none of the signs involved in the suit were located in those two places. The evidence also showed that the unzoned commercial or industrial area exception was meaningless because another regulation which required signs to be 500 feet beyond exit ramps prevented placement of any signs pursuant to the unzoned area exception. The only alternative left, an on-premise sign, was demonstrated to be inadequate because it does not allow the motorist sufficient time to decide to stop and to exit the highway.

The reliance by the State and by the Supreme Court of New Mexico solely on a presumption of constitutionality to uphold the statute is contrary to this Court's mandates in *Virginia Pharmacy Board, Linmark Associates,* and other First Amendment cases. Moreover, the Supreme Court's cavalier refusal to consider the undisputed evidence and findings of fact demonstrating beyond rational question the violations of appellant's constitutional rights underscores the meaning of the ruling; which is, that under no state of facts will the New Mexico courts afford any free speech protection to roadside businessmen. The Act was held constitutional upon legislative declarations which are contrary to the facts. Upon such fictional underpinnings, the Act cannot stand.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the
SUPREME COURT OF
THE STATE OF NEW MEXICO

No. 11946

[Filed: Aug. 6, 1979]

STUCKEY'S STORES, INC., a Delaware corporation, Individually and as Representative on behalf of its Franchisees in the State of New Mexico, George Bassett, Robert B. Gottlieb and Shelby C. Phillips, Jr.,

Plaintiffs-Appellants,

v.

FRED O'CHESKEY,
Chief Highway Administrator,
State Highway Department,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT
OF SANTA FE COUNTY
(Santiago E. Campos, District Judge)

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SOSA, Chief Justice:

The questions we addressed in this appeal are:

1. Does the New Mexico Highway Beautification Act, §§67-12-1 to 14, N.M.S.A. 1978 (hereinafter referred to as the first[1] and fourteenth amendments[2] to the United States Constitution and Article II, §17[3] of the New Mexico Constitution?

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[1]The first amendment provides in relevant part that:

> Congress shall make no law . . . abridging the freedom of speech, ...

[2]Section 1 of the fourteenth amendment provides in part that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, ...

[3]Article II, §17 provides in pertinent part that:

> Every person may freely speak, write and publish his sentiments on all subjects, . . . and no law shall be passed to restrain or abridge the liberty of speech . . . .

2. Do the permit provisions of the Act violate the just compensation and due process clauses[4] of the United States and New Mexico Constitution?

3. Are plaintiffs' outdoor advertising signs erected prior to the 1971 amendments to the Act "lawfully erected" under state law and thus entitled to compensation in the event the State condemns them under the Act?

4. Did the State Highway Department waive any right to claim it can destroy all of plaintiffs' lawfully erected signs for which 1976 permit fees had been paid by reason of the Department's acceptance of the fees?

5. Is the State Highway Department equitably estopped from claiming that certain of the plaintiffs' signs may be taken by it without the payment of just compensation?

On August 9, 1976, plaintiff Stuckey's Stores, Inc. (hereinafter refered to as Stuckey's), a Delaware corporation, individually and as a representative if its New Mexico franchisees, filed this action in the District Court

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[4]The fifth amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article II, §20 of the New Mexico Constitution provides that:

> Private property shall not be taken or damaged for public use without just compensation.

Article II, §18 of the New Mexico Constitution provides in part that:

> No person shall be deprived of life, liberty or property without due process of law; . . . .

of Santa Fe County seeking a judgment declaring the Act and certain regulations adopted thereunder unconstitutional. Stuckey's also sought a preliminary injunction enjoining defendant from destroying plaintiffs' outdoor advertising signs pursuant to the Act.

On January 11, 1978, after a three-day non-jury trail, the district court entered its judgment against plaintiffs on all issues. The court concluded that the Act is a valid exercise of the State's policy power. It also concluded that enforcement of the Act against plaintiffs does not deny them due process of law or freedom of speech in violation of the United States and New Mexico Constitutions. Plaintiffs appeal.

Plaintiffs Bassett, Gottlieb and Phillips own lands adjacent to the rights-of-way of interstate and primary highways in New Mexico. Outdoor advertising signs relating to plaintiffs' stores are situated on these lands, which are located outside of any zoned industrial or commercial areas. Plaintiffs' businesses consist of furnishing and selling gasoline and other motor products, food, candy, souvenirs and novelties to motorists using the interstate and primary highways along which their businesses are located. Plaintiffs' stores are rurally located and, in most instances, are a substantial distance from the closest town along the same interstate or primary highway at which similar goods or services are available. Approximately 80 percent of plaintiffs' customers are out-of-state passenger car motorists; 15 percent are in-state passenger car motorists from other parts of New Mexico; and 5 percent are local passenger car motorists.

The location of a Stuckey's store along an interstate or primary highway is made known to motorists of such highways by means of outdoor advertising signs located outside, but within 660 feet of, the right-of-way of such

highways on privately owned land pursuant to agreements between the store owner and the owner of the land on which the signs are situated. Advertising signs are spaced at intervals along the highway in both directions from plaintiffs' stores.

The New Mexico Highway Beautification Act was promulgated in 1966 in response to the federal Highway Beautification Act of 1965, *as amended*, 23 U.S.C. §§131, 136, 319 (1966 & Supp. 1979). *See* N.M. Laws 1966, ch. 65, §§1-17. The federal Act specifies that unless a state provides for effective control over outdoor advertising along its interstate and primary highways, federal-aid highway funds will be reduced by amounts equal to 10 percent of the amounts which would otherwise be apportioned to that state. 23 U.S.C. §131(b).

The New Mexico Act conforms with the requirements of the federal Act. It provides that:

> In order to promote public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in public highways and to preserve and enhance the scenic beauty of lands bordering public highways, it is the public policy of this state to regulate the erection and maintenance of outdoor advertising . . . in areas adjacent to the interstate and primary systems in accordnace with the Highway Beautification Act [67-12-1 to 67-12-14 NMSA 1978]. The legislature finds that regulation of outdoor advertising . . . is for a highway purpose.

§67-12-3.

The Act only applies to New Mexico's federal-aid interstate and primary highway systems. It does not apply to New Mexico's secondary system or to other state highways. According to State Highway Depart-

ment surveys, approximately 5.6 percent of the total highways and roads in New Mexico are currently designated as interstate and primary highways. The Act prohibits the erection and maintenance, after 1966, of any outdoor advertising within 660 feet of the nearest edge of the right-of-way of an interstate or primary highway, unless it is an on-premise sign, an off right-of-way sign located in areas which are zoned industrial or commercial[5] under authority of law, or in unzoned industrial or commercial areas[6] as defined by regulations promulgated by the State Highway Commission (hereinafter referred to as Commission). §67-12-3.

The Act also provided that the Commission shall establish and collect uniform fees for the issuance of permits for outdoor advertising. §67-12-5(C). Failure

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[5]Article 1050, paragraph 33 of the State Highway Commission's regulations defines "zoned industrial or commercial areas" as

> Those areas which are reserved for business, commerce, trade, manufacturing, or industry, pursuant to a validly promulgated state or local ordinace or regulation.

[6]Article 1050, paragraph 29 of the regulations defines an "unzoned commercial or industrial area" as

> any unzoned lands upon which there is located a bona fide commercial or industrial activity operating for at least six (6) continuous months of the year with a valid 12 months business license issued by a city, county or the state, whether or not a permanent structure is located thereon, and the area along the highway extending outward 1,000 feet from and beyond the edge of such commercial or industrial activity and extending perpendicular from the center line to a depth of 660 feet from the nearest edge of the right-of-way line on the same side of the highway as the commercial or industrial activity.

to timely payment of the permit fee renders the outdoor advertising subject to removal by the Commission without compensation and at the owner's expense. §67-12-5(D).

I.

WHETHER THE ACT ABRIDGES PLAINTIFFS' FREEDOM OF SPEECH

In their first point, plaintiffs claimed that the Act impermissibly infringes upon the first amendment guarantee of freedom of speech made applicable to the states by the fourteenth amendment to the United States Constitution and Article II, §17 of the New Mexico Constitution. Plaintiffs challenge the court's findings which provide, in effect, that:

1. outdoor advertising signs limited to locations on the premises or within 1,000 feet of a Stuckey's store or to commercially or industrially zoned areas along interstate or primary highways in New Mexico afford a reasonable means of informing the motorist of such highways of the presence and location of a Stuckey's store;
2. the Act sets forth a regulatory scheme for outdoor advertising which is reasonable, tends to promote the purposes of the Act, and does not impose an undue burden upon any class of persons; and
3. the regulatory scheme constitutes a reasonable regulation as to time, place and manner of plaintiffs' communications of commercial information through outdoor advertising.

Plaintiffs argue that these findings are not supported by substantial evidence. They contend that the limited advertising allowed by the Act does not afford timely,

adequate or feasible means of informing traveling motorists on interstate and primary highways of the presence of, or the goods and services available at, its stores. Plaintiffs argue that the evidence supports their requested finding that patronage, sales and property values have been substantially reduced by the limited advertising allowed under the Act. Defendant counters that the court's findings are supported by substantial evidence.

We have previously addressed the issue of the Act's constitutionality. In *National Advertising Co. v. State, Etc.*, 91 N.M. 191, 571 P.2d 1194 (1977), sign owners brought suit seeking a declaratory judgment that they should be compensated for the value of their signs which had been removed pursuant to the Act, or alternatively, if their signs were not compensable, that the Act be held unconstitutional as applied to them. This Court specifically held that the Act "is a constitutional enactment by the Legislature." *Id.* at 193, 571 P.2d at 1196. The Court said:

> [I]t was implicit in the Memorandum Opinion that the Act was considered a valid exercise of the state's police power. Property is always held subject to the fair exercise of the state's police power, and reasonable regulations enacted for the benefit of the public health, convenience, safety, or general welfare are not unconstitutional. (Citations omitted.)

Id. at 193, 571 P.2d at 1196.

Plaintiffs argue that the holding in *National Advertising* is inapplicable to the case at bar because the Act was challenged on due process, rather than first amendment, grounds. For the purpose of clarification, we now hold that the Act does not abridge plaintiffs' guarantee of freedom of speech in violation of the United States and New Mexico Constitutions.

Like the federal Highway Beautification Act, the state Act restricts the place and manner of erection of plaintiffs' outdoor advertising structures. It does not regulate the advertising on the basis of its content nor does it completely prevent the dissemination of the same information by alternative means. Thus, we are not faced with a content regulation. In addition, the Act, as applied to plaintiffs, involves restrictions on commercial, rather than political or ideological, speech. The next question, then, is whether plaintiffs' advertising constitutes the type of speech protected by the first and fourteenth amendments to the United States Constitution and Article II, §17 of the New Mexico Constitution. For the reasons set forth below, we hold that it does not.

Two recent United States Supreme Court cases have accorded first amendment protection to commercial speech. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Supreme Court reversed a conviction for violation of a Virginia statute that made circulation of any publication encouraging or promoting abortions in Virginia a misdemeanor. The Court rejected the argument that the advertisement involved in that case was unprotected because it was commercial speech. Instead, the Court held that advertising is not stripped of all first amendment protection. The Court stated:

> Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. (Citations and footnote omitted.) To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged.

Id. at 826.

In *Va. Pharmacy Bd. v. Va. Consumer Council* 425 U.S. 748 (1976), consumers of prescription drugs brought suit against the Virginia State Board of Pharmacy challenging the validity of a Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. The Supreme Court affirmed the district court's decision holding the statute void. The Court held that first amendment protection extends to advertising of a purely commercial nature and that it is not limited to speech of "public interest." Though the Court concluded that commercial speech is protected, it did not hold that such speech could never be regulated. Indeed, the Court states that "[s]ome forms of commercial speech regulation are surely permissible." *Id.* at 770. The Court concluded that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity . . . ." *Id.* at 773.

In *Lindmark Associates, Inc. v. Willingboro,* 431 U.S. 85 (1977), the Supreme Court invalidated as unconstitutional a municipal ordinance which prohibited the posting of real estate "For Sale" and "Sold" signs for the purpose of stemming what the municipality perceived as white flight from a racially integrated community. The Court stated:

> [T]he Willingboro ordinace is not genuinely concerned with the *place* of the speech—front lawns—or the *manner* of the speech—signs. The township has not prohibited all lawn signs—or all lawn signs of a particular size or shape—in order to promote aesthetic values or any other value "unrelated to the suppression of free expression," . . . . (Citation and footnote omitted.) Willingboro has proscribed particular types of signs based on their *content* because it rears their "primary" effect—that they

> will cause those receiving the information to act upon it. That the proscription applies only to one mode of communication, therefore, does not transform this into a "time, place, or manner" case. (Citations omitted and emphasis added.)

Id. at 93-4.

A regulation must satisfy three criteria in order to constitute a legitimate time, place, and manner restriction are:

> (1) the restriction on speech must be "justified without reference to the content of the regulated speech," (2) the restriction must "serve a significant governmental interest." and (3) in so doing, the restriction must "leave open ample alternative channels for communication of the information." (Citations omitted.)

John Donnely & Sons v. Mallar, 453 F. Supp. 1272, 1277 (S.D. Me. 1978). *See also Va. Pharmacy Bd.,* 425 U.S. at 771.

The North Dakota Supreme Court recently addressed the constitutionality of the North Dakota Highway Beautification Act in *Newman Signs, Inc. v. Hjelle,* 268 N.W.2d 741 (N.D. 1978), *appeal dismissed,* 47 U.S.L.W. 3544 (1979). The court concluded that §§24-17-01 through 15, N.D.C.C. 1967 (Repl. 1978), which is almost identical to our Act, did not violate the first amendment guarantee of freedom of speech in that the time, place, and manner restrictions under the North Dakota Act satisifed the criteria set forth in *Va. Pharmacy Bd., supra,* and in *John Donnely & Sons, supra.* The court in *Newman* said:

> [W]e must balance the interests of the State against those of Newman. The State has an interest in providing a safe place for the users of the State high-

ways . . . . The nature of highway driving is such that the eyes of the driver may be diverted, sometimes subconsciously, from the road to the billboard. It is therefore reasonable to assume that the existence of highway billboards could have a detrimental effect on traffic safety.

* * *

The State also has a legitimate interest in protecting, preserving, and enhancing the aesthetic quality of its land . . . .

Id. at 761. The court continued:

The interests of Newman are minimcal in comparison with the public interest involved and the effect that the regulations have on the public and the businesses contracting for advertising space is not so substantial as to outweigh the State's interest is providing a safe and visually pleasing environment.

Id. at 761-2.

We hold that the Act meets the three-pronged test used to determine whether a time, place, and manner restriction is valid. First, the Act's restrictions on plaintiffs' exercise of their freedom of speech is "justified without reference to the content of the regulated speech." None of the Act's stated purposes—promotion of public safety, health, welfare, convenience and enjoyment of public travel, protection of public investment in public highways, and preservation and enhancement of the scenic beauty of lands bordering the public highways—are related to a particular message of such signs. § 67-12-3.

Secondly, the Act's restrictions on plaintiffs' freedom of speech "serve a significant governmental interest." Those interests are matters with which states have been traditionally concerned. In *John Donnelly & Sons, supra,* the federal district court stated:

The emerging majority position, however, and the one to which this Court subscribes, is that the preservation and promotion of aesthetic standards do serve as an adequate basis for comprehensive anti-billboard legislation . . . . (Citations omitted.)

453 F. Supp. at 1278. *See also Village of Belle Terre v. Boraas,* 416 U.S. 1, 5-6 (1974); *Berman v. Parker,* 348 U.S. 26, 33 (1954).

Section 67-12-3 also provides that the Act is designed to "protect the public investment in public highways". State compliance with the terms prescribed by the federal Highway Beautification Act insures that New Mexico receives its share of federal-aid highway funds.

[W]hen legislation based on aesthetic considerations also promotes economic growth, a significant governmental interest is served. (Citations omitted.)

John Donnelly & Sons, 453 F.Supp. at 1279. *See also Moore v. Ward,* 377 S.W.2d 881 (Ky. 1964); *General Outdoor Adv. Co. v. Department of Public Wks.,* 289 Mass. 149, 193 N.E. 799 (1935).

As the third prong of testing a time, place, and manner restriction, we find that the Act "leaves open ample alternative channels for communication of the information." Section 67-12-4 provides six exceptions to the outdoor advertising prohibited by the Act. Three of these exceptions are the placement of signs on premises occupied by plaintiffs' stores, in areas zoned commercial or industrial under the authority of law, and in areas unzoned commercial or industrial as defined by the Commission's regulations.

An additional alternative is provided by the "Logo Program." This program allows the State Highway Department to place signs approximately one-half of a

mile before an interchange at which a commercial establishment, such as plaintiffs', is located, advertising the name of the business and the fact that it provides gas, food, or lodging. The Logo signs are placed within the rights-of-way of the interstate and primary highways in order to adequately inform traveling motorists on these highways of the presence of such businesses. Indeed, four of plaintiffs' ten New Mexico establishments have been approved for placement on such Logo signs. In addition, plaintiffs introduced no evidence that any of their stores, which availed themselves of on-premise or unzoned commercial or industrial area signs after other off-premise signs had been removed, had suffered a great loss of business so as to rebut the presumption that the Act provides adequate means for plaintiffs to exercise their freedom of speech.

Finally, we note that other courts that have considered the first amendment constitutionality of comprehensive anti-billboard legislation, such as is involved in the instant case, have sustained the statute. *See John Donnelly & Sons,* 453 F. Supp. at 1280. For the foregoing reasons, we hold that the Act does not violate plaintiffs' first amendment rights.

II.

WHETHER THE ACT VIOLATED THE JUST COMPENSATION AND DUE PROCESS CLAUSES

In their second point, plaintiffs attack the Act's permit provisions on two constitutional grounds. First, plaintiffs contend that the permit provisions allow for the taking of private property without payment of just compensation in violation of the fifth amendment to the United States Constitution and Article II, §20 of the New Mexico Constitution. Second, they argue that the

provisions abridge their due process rights in violation of the fourteenth amendment to the United States Constitution and Article II, §18 of the New Mexico Constitution. Plaintiffs challenge the court's conclusions which provide, in effect, that:

1. enforcement of the Act against plaintiffs does not take or damage their private property for public use without just compensation and therefore does not violate the United States and New Mexico Constitutions; and
2. enforcement of the Act against plaintiffs does not deprive them of due process of law under the United States and New Mexico Constitutions.

The specific provisions attached by plaintiffs include §§67-12-4(B) and (C), 67-12-5(C) and (D), 67-12-6(A)(1) and (2), and 67-12-6(C) and (F). These provisions were added to the Act in 1971 and became effective on March 15, 1971. *See* N.M. Laws 1971, ch. 140 §§ 2, 3 and 4.

Under §67-12-4(B) and (C), any outdoor advertising which was lawfully in existence on the effective date of the Act and which has continued to so exist may remain in place until it is acquired by the Commission, but only so long as the advertising conforms with standards and bears permits for which the fee has been paid. The Commission may acquire outdoor advertising if it bears the requisite permit and the permit fee required in connection with the advertising's maintenance has been timely paid. §67-12-6(A)(1) and (2). A permit fee is deemed timely paid if it is received by the Commission on or before the first day of the year for which it is being paid. Failure of timely payment renders the outdoor advertising subject or removal by the Commission without any

compensation whatsoever and at the expense of the owner of the outdoor advertising. §67-12-5(D). Finally, no notice is required in connection with permit fees. §67-12-6(C).

The regulation of outdoor advertising along interstate and primary highways is a reasonable and proper exercise of the police power. *See, e.g., National Advertising,* 91 N.M. at 193, 571 P.2d at 1196; *Markham Advertising Company v. State,* 73 Wash.2d 405, 439 P.2d 248, 261 (1968), *appeal dismissed,* 393 U.S. 316 (1960), *rehearing denied,* 393 U.S. 1112 (1969); *In Re Opinion of the Justices,* 103 N.H. 168, 169 A.2d 762, 764 (1964); *General Outdoor Adv. Co.,* 193 N.E. at 816.

In *Newman Signs, Inc., supra,* the North Dakota Supreme Court considered whether that state's Highway Beautification Act's purposes were within the scope of the state's police power. The court said:

> [A] reasonable restriction of the use of property pursuant to a State's police power does not constitute a taking of private property for public use requiring payment of just compensation so long as the regulation is reasonably related to a proper purpose and does not unreasonably deprive the property owner of all or substantially all use of his property. (Citations omitted.)

268 N.W.2d at 755-6. The court concluded that the North Dakota Act was reasonably related to legitimate governmental purposes and that it did not deprive plaintiff of all or substantially all of the beneficial use of its property.

We note that the purposes of North Dakota's Act are similar to those provided in §67-12-3 of the Act. Those purposes include "promoting the safety and convenience of those traveling on the highways; protecting the public

investment in the State highway system; and promoting the enjoyment and recreational value of the State highways." *Id.* at 757. *See also Markham Advertising Company,* 439 P.2d at 260.

We hold that the Act's restrictions are "reasonably related to proper purposes." Furthermore, the restrictions do "not unreasonably deprive the property owner of all or substantially all use of his property." The owner of the land upon which a sign is situated merely loses the right to use or lease certain areas of his property for the purpose of highway billboards. The sign owner merely loses the right to place the billborad on certain sites. In addition, the State Highway Department only orders the removal of those signs which are illegal. Thus, a sign owner only loses the use of a sign in a particular location if he either erects the sign after 1966 in contravention of the Act or if he fails to keep his permit current. *Cf. Sullivan Outdoor Advertising v. Dept. of Transp.,* 420 F. Supp. 815 (N.D. Ill. 1976). In *Sullivan Outdoor Advertising,* the federal district court addressed the constitutionality of the Illinois Highway Advertising Control Act of 1971, Ill.Rev.Stat. ch. 121, §501 *et seq.* (1973). Like our Act, the Illinois statute provides that certain classes of signs, which are declared unlawful, are subject to removal without just compensation. The court determined that plaintiff's contention, that the provision allowing for the taking of signs without compensation conflicted with the just compensation clause of the federal Act, was insubstantial and devoid of merit. *Id.* at 819.

We conclude that the Act is a valid exercise of the police power. We, therefore, affirm the court's conclusion that enforcement of the Act against plaintiffs does not violate the just compensation clauses of the United States and New Mexico Constitutions.

Plaintiffs next argue that even if the Act is upheld as a valid exercise of the state's police power, the Act's permit provisions are unreasonable, arbitrary and capricious and, therefore, violate the due process clauses of the United States and New Mexico Constitutions. Plaintiffs' argument focuses on §67-12-6(C). Even though §67-12-6(C) does not require the State Highway Department to give notice in connection with permit fees, we note that the Department's standard procedure for removal of any illegal sign is the issuance of a thirty-day notice to the sign owner. Section 1063.00 of the Commission's regulations pertains to the removal of noncompensable signs. It provides:

> Permit Violations: Any outdoor advertising notice which has been erected or maintained in violation of the permit requirements of the Beautification Act or Regulations, which has been erected or maintained without timely payment of all permit fees required by the Beautification Act or Regulations, is subject to removal by the Department without any compensation whatsoever and at the expense of the owner of the outdoor advertising device. *Such removal will be preceded by notice to the owner of the outdoor advertising device,* if known, that the device must be removed within 30 days or will be subject to removal by the Department at the owner's expense. If the outdoor advertising device is not removed within the 30 days, the Department may thereafter remove the device at the expense of the owner of the device without any compensation whatsoever. (Emphasis added.)

This procedure was followed in regard to all of the signs involved in this lawsuit. We find that this procedure complies with the requirements of procedural due process.

In *John Donnelly & Sons, supra,* plaintiffs challenged the constitutional validity of the Maine Traveler Information Services Act, 23 M.R.S.A. §§1901-1925 (1978). Plaintiffs claimed that the Maine statute constituted an invalid exercise of the police power in contravention of the fourteenth amendment due process clause. The court determined that plaintiffs' claim was without merit. 453 F.Supp. at 1280. In *Sullivan Outdoor Advertising, supra,* the federal district court concluded that plaintiffs' claim was without merit. 453 F.Supp. at 1280. In *Sullivan Outdoor Advertising, supra,* the federal district court concluded that plaintiff's substantive due process claim was insubstantial. 420 F. Supp. at 820.

Plaintiffs in *Markham Advertising Company, supra,* contended that Washington's Highway Control Act deprived them of due process because it authorized the taking of their property without compensation. The Washington Supreme Court said:

> When a court determines, as we have in this case, that the police power has been properly invoked, there is no basis for this contention. (Citations omitted.) . . . Plaintiffs' due process rights have been secured to them once it has been determined that the exercise of the police [*sic*] power is in harmony with constitutional requirements.

439 P.2d at 261.

We adopt the rationale followed by the courts in *John Donnelly & Sons, supra, Sullivan Outdoor Advertising, supra, and Markham Advertising Company, supra.* Plaintiffs have failed to show that the Act is not in furtherance of legitimate legislative objectives or that the means set out by the Act and by the Commission's regulations are not reasonably related to the Act's objectives. We conclude that the Act's permit provisions are not arbi-

trary or capricious and that they are reasonably necessary in order for the State High Department to ensure compliance with the Act's provisions. The court's conclusion that enforcement of the Act against plaintiffs does not violate the due process clauses of the United States and New Mexico Constitutions is hereby upheld.

III.

WHETHER PLAINTIFFS' SIGNS ERECTED PRIOR TO THE 1971 AMENDMENTS TO THE ACT WERE "LAWFULLY ERECTED" UNDER THE ACT

In their third point, plaintiffs assert that their signs, which were erected after the effective date of the Act, but prior to the 1971 Amendments to the Act, were "lawfully erected" under the Act and, therefore, that they are entitled to just compensation in the event that the State condemns them.

Section 67-12-6(A)(4) provides that the Commission may acquire all outdoor advertising which "was lawfully in existence on the effective date of the . . . act . . . and has continued to so exist, or was lawfully erected subsequent to said effective date." Plaintiffs contend that the Legislature intended that all outdoor advertising erected subsequent to the 1966 Act and prior to the 1971 Amendments was "lawfully erected" under the statute. Defendant counters that plaintiffs' signs which, were erected subsequent to the 1966 Act and which are not within one of the exceptions set forth in §67-12-3, were not lawfully erected and, therefore, plaintiffs are not entitled to just compensation for the removal of their signs.

The district court found that plaintiffs' signs, which were erected subsequent to the effective date of the Act, have at all times since the date of their erection failed to

quality under any of the exceptions set forth in §67-12-4(A). Permit applications and permit fees were not tendered as required by the Act. The court concluded that these signs are public nuisances because they failed to qualify under §67-12-4(A) and because they failed to comply with the Act's permit provisions.

Section 67-12-4(A) establishes six exceptions to the Act's prohibition against outdoor advertising. These six exceptions are the only signs that may be lawfully erected after 1966. We conclude that those devices erected after the effective date of the Act and prior to the 1971 Amendments which do not qualify under §67-12-3(A)(1) through (4) were erected in violation of the Act. Therefore, we hold that plaintiffs' signs erected after the Act's effective date and prior to the 1971 Amendments were not lawfully erected.

IV.

WHETHER THE STATE HIGHWAY DEPARTMENT WAIVED THE RIGHT TO CLAIM IT CAN DESTROY PLAINTIFFS' SIGNS

In their fourth point, plaintiffs argue that the trial court erred in refusing to rule that the State Highway Department had waived any right to claim it could destroy all of plaintiffs' signs which had paid their permit fees by reason of the Department's acceptance of late fees. The fees for the years 1968, 1969, 1970 and 1971 for the signs at issue were paid on November 18, 1971. Plaintiffs claim that because the Department accepted the fees, it waived its right to claim that the permit fees were untimely paid and, therfore, that it could acquire the signs without paying just compensation. Defendant counters that there was no waiver because at State Highway Department employee cannot waive the provisions

of the Act and because there was no intent to waive the provisions.

Section 67-12-5(D) provides in relevant part that:

> Any permit fee payable for the years 1966 through 1971 inclusive shall be deemed timely paid if, but only if, the fee is received by the commission prior to July 1, 1971 . . . .

The fees for the signs at issue were not paid prior to July 1, 1971; they were paid on November 18, 1971. There is no dispute that the fees were not timely paid. The question is whether the Department waived its right to claim it could destroy plaintiffs' signs due to untimely payment once it accepted the fees.

A waiver has been defined as "the intentional relinquishment or abandonment of a known right, . . . the act of waiver may be evidenced by conduct as well as by express words. (Citations omitted.)" *Cooper v. Albuquerque City Commission,* 85 N.M. 786, 790, 518 P.2d 275, 279 (1974). *See also* 28 Am. Jr. 2d *Estoppel and Waiver* §154 (1966). To constitute a waiver, the right claimed to have been waived must have been in existence at the time of the alleged waiver. 28 Am. Jr. 2d *Estoppel and Waiver* §157 (1966).

In the case before us, the State Highway Department knew that the fees in question were not timely paid when it accepted the fees. Nonetheless the Department issued the permits. Under these circumstances, we hold that the Department cannot claim the benefit of §67-12-5(D) in an effort to acquire plaintiffs' signs. We are of the opinion that the Department's acceptance of the late permit applications and permit fees and the issuance of the permits constituted a waiver by the Department of §67-12-5(D). The court's conclusion that

acceptance of the late applications and fees did not constitute a waiver is reversed.

V.

WHETHER THE STATE HIGHWAY DEPARTMENT IS EQUITABLY ESTOPPED

In their final point, plaintiffs argue that the trial court erred in ruling that the State Highway Department is not equitably estopped from claiming that certain of plaintiffs' signs may be taken by it without just compensation. Defendant counters that the Department is not estopped from ordering the removal of these signs.

The nine signs at issue were erected prior to the effective date of the Act. The signs became subject to a State Highway Department right-of-way acquisition in 1967; however, the signs were not condemned by the Department. On November 2, 1967, the Department granted plaintiffs McClue permission to relocate the signs without affecting the owner's right to compensation in the event that the signs were subsequently acquired by the Commission. The Department indicated to the sign owner before the erection of the signs at the new locations that they would be considered on-premise signs for the present. At trial defendant aruged that the signs to be removed without compensation since their placement occurred after the effective date of the Act. Permit fees had been paid for the signs each year through 1968.

In *State ex rel. State Highway Department v. Yurcic,* 85 N.M. 220, 223, 511 P.2d 546, 549 (1973), the Court quoted the following language which is set forth in *Westerman v. City of Carlsbad,* 55 N.M. 550, 555-6, 237 P.2d 356, 359 (1951):

> The essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct

> which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct all be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (a) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

In *State ex. rel. State Highway Dept. Etc. v. Shaw,* 90 N.M. 485, 565 P.2d 655 (1977), the Court agreed with the defendants' assertion that equitable estoppel procluded the State from denying their recovery of the enhanced value of their land in that condemnation proceeding. This Court rejected the trial court's reasoning that estoppel did not apply because there was not false representation or concealment on the part of the State Highway Department. We said:

> The trial court failed to apply that part of the Yurcic test which triggers an estoppel claim when the "conduct . . . is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert . . . ." It is clear that the Department is now adopted a position that is contrary to its representations to the defendant in 1973. *Representations that are contrary to the essential facts to be relied upon, even though made innocently or by mistake, will support the application of the estoppel doctrine.* (Emphasis added.)

Id. at 488, 565 P.2d at 658.

In the case at bar, the district court found that plaintiffs failed to show that they had relied on the Department's representation that the relocation of the signs would not affect the owner's right to compensation. It is our opinion that this finding is in error. By granting permission to plaintiffs to relocate the signs, the Department's conduct conveyed to plaintiffs that the right to compensation would not be affected. Plaintiffs acted upon that permission as is evidenced by the fact that the signs were moved to new locations soon after the permission was granted. The finding of the district court in this regard is conversed. We hold that the Department is equitably estopped from claiming that plaintiffs McClures' signs were "newly erected" and are subject to removal without just compensation.

The decision of the district court is thus affirmed in part and reversed in part. The cause is remanded to the district court for further proceedings not inconsistent with this opinion.

IT IS SO ORDERED.

/s/ Dan Sosa, Jr.
Chief Justice

WE CONCUR:

/s/ H. Vern Payne
Justice

/s/ William R. Federici
Justice

APPENDIX B

IN THE
SUPREME COURT OF THE STATE OF
NEW MEXICO

No. 11946

[Filed: Aug. 16, 1979]

STUCKEY'S STORES, INC., a Delaware corporation, Individually and as a Representative on behalf of its Franchisees in the State of New Mexico, George Bassett, Robert B. Gottlieb and Shelby C. Phillips, Jr.,

Plaintiffs-Appellants,

v.

FRED O'CHESKEY,
Chief Highway Administrator/State
Highway Engineer of the New Mexico
State Highway Department,

Defendant-Appellee.

MOTION FOR REHEARING

Pursuant to Rule 19, Rules of Appellate Procedure, Plaintiffs-Appellants move the Court for a rehearing of the Freedom of Speech claim on the following grounds:

1. The decision overlooks the plethora of New Mexico case-law, some of which is cited at page 1 of the Brief-in-Chief, which holds that a judgment dependent upon findings of fact not supported by substantial evidence, which are property attacked or challenged on appeal, must be reversed. Appellants demonstrated in their brief (pp. 2-7), that the trial court's Findings 11, 15, and 17, upon which the Free Speech part of the Judgment is based, are not supported by one word of evidence in the record. All of the pertinent evidence is to the contrary. The State did not cite any evidence in its brief which would support the Findings and this Court, through properly characterizing the issue as involving a substantial evidence question, did not even address it in the body of the decision. If it had forthrightly done so, the Judgment would have to be reversed.

2. The decision overlooks or misapprehends the United States Supreme Court decisions in the First Amendment area that unanimously place upon the *government* the burden of *factually* demonstrating (1) "paramount" or "significant" governmental interests sufficient to overcome the free speech interests at stake and (2) that the restrictions on speech leave open "ample alternative channels of communication". See *Brief-in-Chief,* pp. 17-18 and *Brief Amicus Curiae,* pp. 6-8.

In this case, the State overtly refused to accept its burden and maintained that a strong presumption of constitutionality and the legislative declaration of purpose set forth in §67-12-3 N.M.S.A. 1978 were sufficient in and of themselves to preclude an attack on the Act on Free Speech grounds. See *Answer Brief,* pp. 1-3 and Tr. 242-243, 343-348, 373-375, 465-469, and 499-500.

In its decision, this court has embraced the State's position in two ways. First, it ignores the sum and substance of the evidence and the trial court's Findings of Fact which demonstrate that no significant governmental interests are served by the Act, particularly safety and esthetics (see Findings 5, 13 and 14, which were not challenged and are binding upon this court), and holds as a matter of law, not fact, that an esthetic purpose is

served as well as that it is "significant" in the constitutional sense.

Second, the decision creates an irrebutable legal conclusion which judicially insulates the Act from any constitutional attack whatsoever. That is, the decision first rules that there is a presumption that the Act leaves open ample alternative channels of communication and thus places the burden of proof upon the Appellants, not the government. Then, even though the Appellants did in fact demonstrate without dispute that no significant governmental interests are served by the Act (see Findings 5, 13, and 14 and *Brief Amicus Curiae,* pp. 9-16), and that the Act leaves no ample alternative channels of communication (See Finding 10, *Brief-in-Chief,* pp. 1-3, *Brief Amicus Curiae,* pp. 1-3, 18-20) the court overlooks and disregards this undisputed evidence and finds upon imaginative fiction that Appellants failed to carry their burden.

3. The decision finds a "significant" governmental interest in protecting the public interest in public highways by insuring that New Mexico does not lose ten percent of its Federal Aid Highway Funds. This statement begs the unstated question which is whether New Mexico would in fact suffer a ten percent reduction should this court declare the Act unconstitutional. It would not. What it would do is require the State Highway Department and the bureaucrats in the Department of Transportation to tailor an "Agreement" in compliance with the First Amendment, i.e., to define "unzoned industrial or commercial area" more broadly than it is at present under guidelines set down by this court, based upon the evidence introduced at trial. Then the Legislature would pass a new Act to satisfy the Federal agreement. Appellants have never maintained that there

should be no Highway Beautification Act, only that the present Act impremissibly infringes upon their First Amendment rights.

4. The Decision overlooks the obligation placed upon it by the United States Supreme Court's decision in *Bigelow v. Virginia,* 421 U.S. 809 (1975) by failing to properly assess the First Amendment interests at stake and weighing them against the public interest allegedly served by the regulation. The First Amendment interest did not even merit a passing word in the decision though establishing them constituted a major part of Appellants' case. (See Findings 4, 5, 6 and 7, Tr. 60-61, *Brief-in-Chief,* pp. 6-7, *Brief Amicus Curiae,* p. 8-9.) It is clear from the decison that no consideration whatever was given to Appellants, consumer, or the public interest in the free flow of information. This was legal error.

5. There are factual errors. First, at page 11 of the decision, the court states that ". . . plaintiffs introduced no evidence that any of their stores, which availed themselves of on premise . . . signs after other off premise signs had been removed, had suffered a great loss of business . . ." Plaintiffs could not have introduced that type of evidence because none of their off-premise signs had been removed prior to trial. They were protected by a preliminary injunction. Because of that fact, however, Plaintiffs did introduce a mound of evidence demonstrating the literal financial disaster which other similar roadside businesses have suffered when their off-premise signs were destroyed. See *Brief-in-Chief,* pp. 6-7.

Second, at page 11 of the decision, it is stated that the "Logo signs are placed within the rights-of-way of the interstate and primary highways in order to adequately

inform traveling motorists on these highways of the presence of such businesses." This is untrue. The Logo program, such as it is, applies only to the interstate, not the primary highways. Tr. 244, 286. Moreover, the undisputed evidence demonstrated the *in*adequacy of the logo program as an ample alternative means of advertising. See *Brief-in-Chief,* pp. 5-6.

For the foregoing reasons, the court is requested to grant this motion for Rehearing and to thereafter reverse the free speech portion of its decision.

/s/ G. Gary Duncan
One of the attorneys for
Plaintiff-Appellants
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Santa Fe, New Mexico 87501
988-5618

I certify that I mailed a copy of the Motion for Rehearing to Stephen Hamilton, P.O. Box 1149, Santa Fe, New Mexico and Raymond Schowers, P.O. Box 1945, Albuquerque, New Mexico on the 16th day of August, 1979.

/s/ G. Gary Duncan

APPENDIX C

IN THE
SUPREME COURT OF THE STATE OF
NEW MEXICO
SANTA FE COUNTY

Tuesday, September 11, 1979

No. 11,946

STUCKEY'S STORES, INC., a Delaware corporation, Individually and as Representative on behalf of its Franchisees in the State of New Mexico, George Bassett, Robert B. Gottlieb and Shelby C. Phillips, Jr.,

Plaintiff-Appellant,

v.

FRED O'CHESKY,
Chief Highway Administrator,
State Highway Department,

Defendant-Appellee.

This matter coming on for consideration by the Court upon Motion of Appellant for Rehearing and Motion of Appellee for rehearing, the Court having considered said motions and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that Motion of Appellant for Rehearing and Motion of Appellee for Rehearing be and the same are hereby denied.

APPENDIX D

IN THE
SUPREME COURT OF THE STATE OF
NEW MEXICO

No. 11946

[Filed: Nov. 19, 1979]

STUCKEY'S STORES, INC., a Delaware corporation, Individually and as Representative on behalf of its Franchisees in the State of New Mexico, George Bassett, Robert B. Gottlieb and Shelby C. Phillips, Jr.,

Plaintiffs-Appellants,

v.

FRED O'CHESKEY,
Chief Highway Administrator,
State Highway Department,

Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Stuckey's Stores, Inc., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico, entered in this action on August 6, 1979, in which a timely motion for rehearing was denied on September 11, 1979.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

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Santa Fe, New Mexico 87501
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/s/ Sarah M. Singleton
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Attorneys for Appellant.

CERTIFICATE OF SERVICE

I, Sarah M. Singleton, a member of the Bar of the Supreme Court of the United States, certify that a copy of the above notice of appeal was served on the Office of the Attorney General of the State of New Mexico, Post Office Drawer 1508, Santa Fe, New Mexico 87501, and on the Legal Division of the State Highway Department, Post Office Box 1149, Santa Fe, New Mexico 87503, by posting the same, first-class, prepaid postage in the mails of the United States this 19th day of November, 1979.

/s/ Sarah M. Singleton

Supreme Court, U. S.
FILED
APR 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1233

STUCKEY'S STORES, INC., a Delaware Corporation, Individually and as a Representative on behalf of its Franchisees in the State of New Mexico,

Appellant,

v.

FRED O'CHESKEY, Chief Highway Administrator, State Highway Department,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1233

STUCKEY'S STORES, INC., a Delaware Corporation, Individually and as a Representative on behalf of its Franchisees in the State of New Mexico,

Appellant,

v.

FRED O'CHESKEY, Chief Highway Administrator, State Highway Department,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the Supreme Court of New Mexico on the ground that the questions on which the decision of the cause depends have been decided by the Supreme Court of the State of New Mexico in accordance with the provisions of the United States Constitution and are so unsubstantial as to require no further argument or review by this Court.

STATEMENT OF THE CASE[1]

This action was filed in the Santa Fe, New Mexico State District Court by Stuckey's Stores, Inc. (hereinafter referred to as Stuckey's) on August 9, 1976 in response to the threatened removal of certain of its highway billboards by the New Mexico State Highway Department (hereinafter referred to as the State Highway Department), who was acting pursuant to the authority of the authority of the New Mexico Highway Beautification Act § 67-12-1, *et seq.* (N.M.S.A., 1978).

The complaint alleged a number of constitutional deficiencies in the New Mexico Highway Beautification Act and also alleged the grounds of waiver and estoppel as bars to the removal of some of the billboards involved. Following a bench trial, the trial court ruled in favor of the State Highway Department (who had been sued through its Chief Highway Administrator, Fred O'Cheskey).

The decision was appealed by Stuckey's to the New Mexico Supreme Court on all grounds raised by the original complaint. The Supreme Court held for the State Highway Department as to all constitutional challenges and held for Stuckey's as to the waiver and estoppel questions. The New Mexico Supreme Court subsequently denied the motions for rehearing filed by both parties. *Stuckey's Stores, Inc. v. O'Cheskey,* 93 N.M. 312, 600 P.2d 258 (1979).

On February 8, 1980, Stuckey's filed a Jurisdictional Statement in this Court in which it appealed from the

---

[1]Appellee by filing this separate Statement of the Case intends to indicate its strong disagreement with Appellant's Statement of the Case, particularly with Appellant's characterization of the evidence elicited at trial.

New Mexico Supreme Court's decision solely on First Amendment Grounds.

The statute in question, the New Mexico Highway Beautification Act (*see* Appendix 1), applies to Interstate and Primary highways located in the State of New Mexico. It sets forth a regulatory scheme which prohibits all Interstate and Primary highway billboards except the following as listed at § 67-12-4 (N.M.S.A., 1978):

> "(1) directional and other official signs and notices authorized or required by laws, including, but not limited to, signs and notices pertaining to houses of worship, natural wonders and scenic and historic attractions;
>
> "(2) signs, displays and devices advertising the sale or lease of property upon which they are located;
>
> "(3) signs, displays and devices advertising activities conducted on the property upon which they are located, provided that the bisection of a parcel of land by a highway right-of-way acquisition shall not in itself be construed as converting the property into more than one parcel;
>
> "(4) signs, displays and devices located in areas which are zoned as industrial or commercial under authority of law;
>
> "(5) signs, displays and devices located within six hundred sixty feet of the nearest edge of the right-of-way, in unzoned industrial or commercial areas as defined by regulations promulgated by the commission, provided that no area shall be considered to be an unzoned commercial or industiral area unless and until a regulation defining the area as unzoned commercial or industrial is promulgated by the commission; and

"(6) signs lawfully in existence on October 22, 1965, determined by the state highway commission, subject to any necessary federal approval, to be landmark signs of historic or artistic significance worthy of preservation including signs on farm structures or natural surfaces."

In addition to the above six exceptions, the State Highway Department has initiated a LOGO program for all Interstate and access-controlled Primary highways. Briefly stated, the LOGO program provides signboards located approximately one-half mile to approximately one mile from the exit gores of eligible rural Interstate and access-controlled Primary highways. Each LOGO site is provided with up to four signboards as is appropriate; one with the heading "gas," one with the heading "lodging," one with the heading "food" and one entitled "camping." Qualifying businesses located near the LOGO site offering one or more of the above services may pay the Department a fee and have their logo placed on the appropriate signboard or signboards. Each signboard has space for four logos, except the GAS signboard which can accommodate six logos.[2]

Therefore, for a roadside business such as the ones operated by Stuckey's, selling food, gasoline and curios, roadside advertising is restricted to the following:

1. On-premise billboards;

[2]Appellant makes a misstatement at p. 8 of its Jurisdictional Statement when it indicates that the LOGO program is restricted to Interstate highways. Such program also extends to access-controlled primary highways. Additionally, contrary to Appellant's allegation, the LOGO program is sanctioned by State law, specifically by Section 67-12-4A(1) N.M.S.A. (1978 Comp.) which provides for directional signs. Appellee is granted authority to erect such signs in order to guide traffic by Sections 66-7-101 and 66-7-102 N.M.S.A. (1978 Comp.).

2. Billboards located within 1,000 feet of the boundaries of the property used for the business (unzoned commercial or industrial areas as defined by state regulation, Outdoor Advertising Rules and Regulations Section 1050.00(29)) (*see* Appendix B);
3. Billboards located in zoned commercial and industrial areas;[3] and
4. LOGO signs advertising "food" and "gas" located prior to the exit gore near which the Stuckey's Store is located.

ARGUMENT

I.

THE DECISION HEREIN BY THE NEW MEXICO SUPREME COURT IS IN ACCORD WITH THE FIRST AMENDMENT.

The restrictions imposed by the New Mexico Highway Beautification Act are clearly a "content blind" form of regulation of speech. The Act merely prescribes the place and manner in which the form of speech here involved, highway billboards, may be displayed. As such, the law is not violative of the First Amendment so long as it satisfies the time, place and manner test set forth by this Court in *Virginia State Board of Pharmacy, et al. v. Virginia Citizens Consumer Council, et al.*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976); and in *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 S. Ct. 1614, 52 L. Ed. 2d 155 (1977), to wit;

[3]The trial court made a Finding of Fact that the combination of on-premise and zoned and unzoned commercial and industrial area signs ". . . afford a reasonable means of informing the motorist of such highways of the presence or location of a Stuckey store or of the goods, services, conveniences or facilities available to him at such store."

(1) the restriction on speech must be justified without reference to the content of the regulated speech;

(2) the restriction must serve a significant governmental interest; and

(3) in so doing the restriction must leave open ample alternative channels for communication of the information.

The New Mexico Supreme Court in applying the above test found that the New Mexico Highway Beautification Act met each of its three criteria. First, the court noted at p. 265 that the restrictions imposed by the Beautification Act are "justified without reference to the content of the regulated speech" since "None of the Act's stated purposes—promotion of public safety, health, welfare, convenience and enjoyment of public travel, protection and enhancement of the scenic beauty of lands bordering the public highways—are related to a particular message of such signs." Secondly, significant governmental interests were found to be furthered by the Act. One such interest set out in the preamble to the New Mexico Highway Beautification Act is "public safety" (§ 67-12-3, N.M.S.A. (1978 Comp.)). It is simply common sense that highway billboards provide distractions to the drivers from the business of driving. As stated in *Newman Signs, Inc. v. Hjelle,* 268 N.W.2d 741, 757 (N.D. 1978), *appeal dismissed,* 440 U.S. 901, 99 S. Ct. 1205, 59 L. Ed.2d 449, quoting *Whitmier and Ferris Co. v. State,* 20 N.Y.2d 413, 284 N.Y. Supp. 2d 313, 315, 230 N.E.2d 904, 905 (1967):

> "'If people did not look at the signs, advertisers would not find it profitable to put them there. It was within the competence of the Legislature to determine that the safety of the traveling public is

> endangered by the distraction of the attention of drivers of automobiles under these circumstances.'"

To a similar effect is *Moore, et al. v. Ward,* 377 S.W.2d 881 (Ky. 1964), at page 886:

> "Obviously a billboard is a distracting device. It diverts and is designed to divert the motorist's attention from the highway. In the public interest the legislature could weigh the right of the motorist to be free of such distracting signs. It could determine they impair the motorist's enjoyment of the highway."

Another interest stated in the preamble to the New Mexico Highway Beautification Act and relied on by the New Mexico Supreme Court was the preservation and enhancement of ". . . the scenic beauty of lands bordering public highways, ..." § 67-12-3, N.M.S.A. (1978 Comp.). Billboards are clearly a form of obtrusive visual blight detracting from the scenic value of the land. As stated by Mr. Justice Brandeis in *Packer Corp. v. Utah,* 285 U.S. 105, 110, 52 S. Ct. 283, 274, 76 L. Ed. 643 (1932):

> "Billboards, streetcar signs and placards and such are in a class by themselves . . . . Advertisements of this sort are constantly before the eyes of the observers on the streets . . . to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer, ... The radio can be turned off, but not so the billboard . . . ."

The question of aesthetics as a valid ground on which to base a billboard regulation was effectively addressed by the federal district court in *John Donnelly & Sons, et al. v. Mallar,* 453 F. Supp. 1272 (D.C. Maine 1978), at p. 1278:

"The emerging majority position, however, and the one to which this Court subscribes, is that the preservation and promotion of aesthetic standards do serve as an adequate basis for comprehensive anti-billboard legislation such as the Maine Act. [Citations omitted.] As Mr. Justice Douglas presciently observed several years ago:

> "'The concept of public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the Legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.'

"*Berman v. Parker,* 348 U.S. 26, 33, 75 S. Ct. 98, 102, 99 L. Ed. 27 (1954); see also *Belle Terre v. Boraas,* 416 U.S. 1, 5-6, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974). The nation's recently-awakened and growing concern for the quality of its environment and the various and widespread steps taken by individuals, citizen groups, and governmental bodies to protect and enhance natural resources demonstrate beyond reasonable question that the Mine Act serves substantial governmental interests through the preservation of aesthetic values." [At page 1278.]

A final governmental interest used by the New Mexico Supreme Court in upholding the New Mexico Highway Beautification Act was based on the protection of "the public investment in public highways." The court here recognized the cold hard economic fact that by virtue of 23 U.S.C. § 131(b) (*see* Appendix C) should New Mexico fail to control highway billboards in the manner required by this federal legislation, it would lose ten percent of its federal highway monies, a vital concern in

a relatively poor and sparsely populated state responsible for a large system of Interstate and Primary highways. The fact that one of the effects of the New Mexico Highway Beautification Act is to economically benefit the taxpayers of the State is a clearly valid governmental interest which has been used by other courts to help validate billboard regulations; *John Donnelly & Sons, et al. v. Mallar, supra*; *Moore, et al. v. Ward, supra*; *General Outdoor Adv. Co. v. Department of Public Wks.,* 289 Mass. 149, 193 N.E. 799 (1935).

The third prong of the time, place and manner test, *i.e.,* the availability of alternative means of communication was also addressed by the New Mexico Supreme Court which found that under the New Mexico Highway Beautification Act, not only could businesses such as Stuckey's place billboards on its premises, in unzoned commercial or industrial areas and in zoned commercial or industrial areas, but there is also available to rural businesses such as Stuckey's the possibility of receiving LOGO signs. The court noted that at the time of trial four of the ten Stuckey's Stores had requested and received LOGO signing.

It clearly appears from the New Mexico Supreme Court's opinion that such court assiduously applied the "time, place, and manner" test to the New Mexico Highway Beautification Act and found such Act to comply with such test's requirements. It is respectfully submitted that such test was properly applied by the New Mexico Supreme Court and that no First Amendment violation exists in the New Mexico Highway Beautification Act.

II.

THE HOLDING OF THE NEW MEXICO SUPREME COURT IS CONSISTENT WITH PRIOR CASES DECIDED BY THIS COURT AND BY OTHER STATE AND FEDERAL COURTS.

The New Mexico Supreme Court is hardly alone in validating billboard laws and regulations in the face of a First Amendment challenge but is in fact supported by a virtual unanimity in reported opinions. The Supreme Court of North Dakota in *Newman Signs, Inc. v. Hjelle, supra,* upheld the constitutionality of the North Dakota Highway Beautification Act (N.D.C.C. 24-17-01, *et seq.*), an act which is almost the mirror image of the New Mexico Highway Beautification Act. The North Dakota Supreme Court in applying the "time, place and manner test" held that the Act there under consideration was not a content regulation but ". . . merely provides restrictions on the place and manner of erection of the outdoor advertising signs" (at p. 760). The Court in *Hjelle* then stated that billboard advertising ". . . has been recognized to be an intrusion on the privacy of those individuals who use the highways" and that although ". . . no empirical evidence was presented to either support or refute the relationship between billboards and traffic safety, we are not prepared to say that such a relationship does not exist, especially when the Legislature has found that it does . . . ." It is ". . . reasonable to assume that the existence of highway billboards could have a detrimental effect on traffic safety"[4] (at p. 761).

[4]One of the arguments made in Stuckey's Jurisdictional Statement is that the State Highway Department failed to introduce evidence supporting the relationship of billboards to traffic safety. It should be noted that, conversely, Stuckey's offered no evidence to disprove the existence of such a relationship. In light of the [footnote continued]

The court also noted the State's legitimate interest in ". . . protecting, preserving, and enhancing the aesthetic quality of its land . . ." and its interest in ". . . protecting the privacy of those individuals who use the highways" (at p. 761). The Court then compared these interests with Newman's interests, noting the fact that there existed alternative means for Newman to communicate its advertising message ". . . one such alternative means being the continuation of billboard advertising within the confines of the statutes" (at p. 761). The Court concluded that:

> "The interests of Newman are minimal in comparison with the public interest involved and the effect that the regulations have on the public and the businesses contracting for advertising space is not so substantial as to outweigh the State's interest in providing a safe and visually pleasing environment." [At p. 761-762.]

Thus, the billboard regulation, the issues involved and the court's analysis of the First Amendment question is

lack of testimony on this subject, the New Mexico Supreme Court relied on the legislature's determination at Section 67-12-3, N.M.S.A. (1978), that "public safety" was furthered by the New Mexico Highway Beautification Act (a similar determination was made by Congress at 23 U.S.C. 131(a)). As is shown by this quotation, the North Dakota Supreme Court, when similarly faced with a lack of empirical evidence, relied on its legislature's finding of a relationship between billboards and traffic safety.

The New Mexico and North Dakota Supreme Courts, in relying on this kind of legislative determination, do no more than give the legislature deference in regard to the determination of the public interest accorded to it by this Court in *Berman v. Parker, supra,* when it stated:

> "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . ."

almost identical in the instant case and in *Newman Signs, Inc. v. Hjelle, supra.* As in the instant case the Plaintiff there appealed the decision of the state court to this court (at 440 U.S. 901, 99 S. Ct. 1205, 59 L. Ed. 2d 449). This Court dismissed the *Newman* appeal for want of a substantial federal question, and, of course, such a dismissal constitutes a decision on the merits of the case, *Hicks v. Miranda,* 422 U.S. 332, 95 S. Ct. 2281, 45 L. Ed. 2d 225 (1975). It is respectfully requested that this Court similarly dismiss the instant appeal.

This Court has also dismissed for want of a substantial federal question the Plaintiff's appeal in *Suffolk Outdoor Advertising Co. v. Hulse,* 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263 (N.Y. 1977), *appeal dismissed,* 439 U.S. 808, 99 S. Ct. 66, 58 L. Ed. 2d 101. In *Suffolk* owners of billboards appealed from the enforcement of a local zoning ordinance which required the non-compensated removal of all off-premises or non-accessory billboards. The Court of Appeals of New York in upholding the First Amendment validity of the ordinance stated at p. 265 that the "regulation of aesthetics" which constituted the purpose of the ordinance was a "significant governmental interest" and "Since the challenged ordinance makes no attempt to regulate the content of the commercial speech appearing on billboards, but rather regulates only the place and manner in which billboards may be maintained, we conclude that the ordinance does not infringe the right to free speech guaranteed by the First Amendment."

Similarly, in *Veterans of For. Wars, Etc. v. Steamboat Springs,* 575 P.2d 835 (Colo. 1978), *appeal dismissed,* 439 U.S. 809, 58 L. Ed. 2d 101, this Court dismissed, for lack of a substantial federal question, the appeal on First Amendment grounds based on the alleged unconsti-

tutionality of a comprehensive sign code which prohibited most off-premises signs. The Supreme Court of Colorado at p. 840 held that such a regulation promotes safety since "Distracting signs may serve to break the concentration of those using the roads with resultant loss of life and property . . . ." The Colorado Court stated at pp. 840-841 that the ordinance was in furtherance of a "pleasant and orderly environment" which was within the "legitimate scope of a municipality's police power." The court also noted the "intrusive nature of signs and billboards" and at p. 841 analogized billboards to the sound trucks whose prohibition was upheld in *Kovacs v. Cooper,* 336 U.S. 77, 69 S. Ct. 448, 93 L. Ed. 513 (1949). The court at pp. 841-842 concluded that, "The city's classification of on premise and off premise signs is reasonable and accommodates the interests of the property owner and the municipality and imposes upon First Amendment rights to a permissible extent."

This Court also dismissed Plaintiff's appeal for lack of a substantial federal question in *State v. Lotze,* 92 Wash. 2d 52, 593 P.2d 811 (Wash. 1979), *appeal dismissed,* ___ U.S. ___, 100 S. Ct. 257, 62 L. Ed. 2d 177. Such case involved the State of Washington's Scenic Vistas Act of 1971 (R.C.W. 47.42), an Act quite similar to the New Mexico Highway Beautification Act. Like the New Mexico Act the Scenic Vistas Act prohibited all highway billboards except "directional signs, official signs, signs advertising the sale or lease of property upon which they are located, signs advertising activities conducted on the property on which they are located . . ." and signs ". . . within commercial or industrial areas . . ." (at p. 813; *compare,* R.C.W. 47.42.040 with N.M.S.A., Section 67-12-4 (1978 Comp.)). The Washington Supreme Court in *Lotze* held at p. 813 that "time, place

and manner" regulations "stand on different footing than laws prohibiting speech altogether" and concluded that:

> ". . . R.C.W. 47.42 as applied to appellants' billboards does not violate their First Amendment rights of free speech. The traffic safety rationale upheld in *Markham Advertising Co. v. State, supra,* and not refuted at trial in these cases is sufficiently compelling to outweigh the minimal restraint on appellants. The statutory scheme represents a reasonable place and manner limitation on speech leaving ample alternative channels of communication for appellants. Appellants' speech is not in any way being controlled as to content; its stricture is narrowly confined to place and manner. The entire panoply of means to communicate their views is open to appellants except for the limited restrictions of R.C.W. 47.42." [At p. 815.]

Finally the cited case in the above quotation, *Markham Advertising Co. v. State,* 439 P.2d 248, 73 Wash. 2d 405, 439, *appeal dismissed,* 393 U.S. 316, 89 S. Ct. 553, 21 L. Ed. 2d 512, *rehearing denied,* 393 U.S. 1112, 89 S. Ct. 854, 21 L. Ed. 2d (1968), was also dismissed by this Court for lack of substantial federal question and also considered the First Amendment constitutionality of R.C.W. 47.42 as there applied to commercial billboards. The Washington Supreme Court in *Markham* ruled that the:

> ". . . intrusive quality of highway outdoor advertising coupled with the hazard it poses to traffic safety and its purely commercial nature, all persuade us that R.C.W. 47.42 is a reasonable regulation which does not violate the First Amendment."

Following the dismissal of the appeal in *Markham Advertising Co. v. State, supra,* this Court in *Young v.*

American Mini Theaters, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976), held as follows at pp. 68-69:

> "We have recently held that the First Amendment affords some protection to commercial speech. We have also made it clear, however, that the content of a particular advertisement may determine the extent of its protection. A public rapid transit system may accept some advertisements and reject others. *A state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere,* and regulatory commissions may prohibit businessmen from making statements which, though literally true, are potentially deceptive. The measure of constitutional protection to be afforded commercial speech will surely be governed largely by the content of the communication." [Emphasis added.]

The emphasized clause is referenced to a footnote citing *Markham Advertising Co. v. State, supra.*

Not only has this Court dismissed the appeals in *Markham Advertising Co. v. State, supra*; *State v. Lotze, supra*; *Suffolk Outdoor Advertising Co. v. Hulse, supra*; *Veterans of For. Wars, Etc. v. Steamboat Springs, supra*; and *Newman Signs, Inc. v. Hjelle, supra,* thereby indicating the unsubstantiality of First Amendment claims against laws such as the New Mexico Highway Beautification Act, but it has emphasized time and again as it does in the above-cited passage from *Young v. American Mini Theaters, supra,* that while commercial speech such as is involved here is afforded some protection by the First Amendment, that protection is considerably less than the protection afforded non-commercial speech. In *Virginia State Board of Pharmacy, et al. v. Virginia Citizens Consumer Council, et al., supra,* this Court stated at note 24, pp. 771-772 that:

"In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. *There are commonsense differences between speech that does 'no more than propose a commercial transaction,' Pittsburgh Press Co. v. Human Relations Comm'n,* 413 U.S., at 385, and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that *a different degree of protection is necessary* to insure that the flow of truthful and legitimate commercial information is unimpaired." [Emphasis added.]

Ohralik v. Ohio State Bar Association, 436 U.S. 447, 56 L. Ed. 2d 444, 98 S. Ct. 1912, *rehearing denied,* ___ U.S. ___, ___ S. Ct. ___, 58 L. Ed. 2d 198 (1978), posed even more clearly this important distinction when this Court stated at pp. 453-454 that:

"We have not discarded the 'commonsense' distinction between speech proposing a commercial transaction which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,* while allowing modes of regulation that might be impermissible in the realm of noncommercial expression. [Citations omitted.] . . . the state

does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. Neither *Virginia Pharmacy* nor *Bates* purported to cast out on the permissibility of these kinds of commerical regulation." [Emphasis added.]

Finally, not only is it clear from the foregoing that commercial speech such as is found on Stuckey's billboards is accorded a much lesser degree of protection and that each of the five First Amendment billboard cases that have come before this Court have been dismissed for lack of a substantial federal question, but there is virtual unanimity in cases decided by state and lower federal courts that billboard regulations such as New Mexico's do no violence to the First Amendment. ***John Donnelly and Sons v. Outdoor Advertising Bd.,*** 339 N.E.2d 709 (Mass. 1975); ***John Donnelly & Sons, et al. v. Mallar, supra***; ***Donnelly Advertising Corp. v. City of Baltimore,*** 279 Md. 660, 370 A.2d 1127 (Md. 1977); ***Metromedia, Inc. v. City of San Diego,*** 23 Cal. 3d 762, 154 Cal. Rptr. 212, 592 P.2d 728 (1979); ***Ackerley Communications, Inc. v. City of Seattle,*** 602 P.2d 1177 (Wash. 1979); ***Ghaster Properties, Inc. v. Preston,*** 200 N.E.2d 328, 176 Ohio St. 425 (1964); ***Howard v. State Dept. of Hwys. of Colorado,*** 478 F.2d 581 (10th Cir. 1973); ***General Outdoor Adv. Co. v. Department of Public Wks., supra***; ***Markham Advertising Co. v. State, supra***; ***Suffolk Outdoor Advertising Co. v. Hulse, supra***; ***State v. Lotze, supra***; ***Veterans of For. Wars, Etc. v. Steamboat Springs, supra***; ***Newman Signs, Inc. v. Hjelle, supra.***

CONCLUSION

It is respectfully submitted that the decision of the New Mexico Supreme Court does not present a substan-

tial federal question for this Court to review and this appeal should be dismissed or the judgment of the New Mexico Supreme Court affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

EXCERPTS FROM THE NEW MEXICO HIGHWAY BEAUTIFICATION ACT

67-12-1. Short Title.

This act [67-12-1 to 67-12-14 N.M.S.A. 1978] may be cited as the "Highway Beautification Act."

67-12-2. Definitions.

As used in the Highway Beautification Act [67-12-1 to 67-1-14 N.M.S.A. 1978]:

A. "interstate system" means that portion of the national system of interstate and defense highways located within the state as may now or hereafter be officially so deignated by the commission and approved pursuant to Title 23, United States Code;

B. "primary system" means that portion of connected main highways located within this state as may now or hereafter be officially so designated by the commission and approved pursuant to Title 23, United States Code;

C. "commission" means the state highway commission;

D. "outdoor advertising" means any outdoor sign, display, light, device, figure, painting, drawing, message, plaque, poster, billboard or other object which is designed, intended or used to advertise or inform, any part of which is located within six hundred sixty feet of the nearest edge of the right-of-way, and is visible from the main-traveled way of the interstate or primary systems or those located beyond six hundred sixty feet of the right of way, located outside of urban areas, visible from the main-traveled way of the system and erected with

the purpose of their message being read from such main-traveled way;

E. "safety rest area" means a site established and maintained by or under public supervision or control for the convenience of the traveling public within or adjacent to the right-of-way of the interstate or primary systems;

F. "information center" means a site established and maintained at a safety rest area for the purpose of informing the public of places of interest within the state and providing other information the commission considers desirable;

G. "junk" means old or scrap copper, brass, rope, rags, batteries, paper, trash, rubber, debris, waste or junked, dismantled or wrecked automobiles or parts thereof, iron, steel and other old or scrap ferrous or nonferrous material;

H. "automobile graveyard" means any establishment or place of business maintained, used or operated for storing, keeping, buying or selling wrecked, scrapped, ruined or dismantled motor vehicles or motor vehicle parts;

I. "junkyard" means any establishment or place of business maintained, used or operated for storing, keeping, buying or selling junk, or for the maintenance or operation of an automobile graveyard any portion of which is located within one thousand feet of the nearest edge of the right-of-way interstate or primary systems and it includes garbage dumps and sanitary fills; and

J. "urban area" means an area including and adjacent to a municipality or other urban place having a population of five thousand or more, as determined by the latest available federal census, within boundaries to be fixed by the state highway commission, subject to any

necessary approval by any federal agency, department or personnel.

67-12-3. Public Policy.

In order to promote public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in public highways and to preserve and enhance the scenic beauty of lands bordering public highways, it is the public policy of this state to regulate the erection and maintenance of outdoor advertising and the establishment, operation and maintenance of junkyards in areas adjacent to the interstate and primary systems in accordance with the Highway Beautification Act [67-12-1 to 67-12-14 N.M.S.A. 1978]. The legislature finds that regulation of outdoor advertising and junkyards is for a highway purpose.

67-12-4. Outdoor Advertising Prohibited; Exceptions.

A. No outdoor advertising shall be erected or maintained except:

(1) directional and other official signs and notices authorized or required by law, including, but not limited to, signs and notices pertaining to houses of worship, natural wonders and scenic and historic attractions;

(2) signs, displays and devices advertising the sale or lease of property upon which they are located:

(3) signs, displays and devices advertising activities conducted on the property upon which they are located, provided that the bisection of a parcel of land by a highway right-of-way acquisition shall not in itself be construed as converting the property into more than one parcel;

(4) signs, displays and devices located in areas which are zoned as industrial or commercial under authority of law;

(5) signs, displays and devices located within six hundred sixty feet of the nearest edge of the right-of-way, in unzoned industrial or commercial areas as defined by regulations promulgated by the commission, provided that no area shall be considered to be an unzoned commercial or industrial area unless and until a regulation defining the area as unzoned commercial or industrial is promulgated by the commission; and

(6) signs lawfully in existence on October 22, 1965, determined by the state highway commission, subject to any necessary federal approval, to be landmark signs of historic or artistic significance worthy of preservation including signs on farm structures or natural surfaces.

B. All outdoor advertising shall conform with standards and specifications, shall bear permits and have paid therefor permit fees, as required by the Highway Beautification Act [67-12-1 to 67-12-14 N.M.S.A. 1978] and regulations promulgated pursuant thereto or authorized thereby, except that permits shall not be required or fees paid for outdoor advertising included in Paragraphs (1), (2) and (3) of Subsection A of this section.

C. Nothing herein to the contrary withstanding, any outdoor advertising which was lawfully in existence on the effective date of the Highway Beautification Act and has continued to so exist may remain in place until the outdoor advertising is acquired by the commission, or condemnation in relation thereto is commenced by the commission, whichever first occurs, but only if and so long as all provisions of Subsection B of this section are complied with.

67-12-5. Outdoor Advertising; Regulations; Permits.

A. The commission may promulgate regulations concerning:

(1) the definition of unzoned industrial or commercial areas adjacent to the interstate and primary systems;

(2) the removal of outdoor advertising so required or authorized under the Highway Beautification Act [67-12-1 to 67-12-14 N.M.S.A. 1978];

(3) permits for the erection and maintenance of outdoor advertising; and

(4) standards and specifications pertaining to outdoor advertising, including, but not limited to, construction, maintenance, spacing, lighting, size and location.

B. Regulations promulgated by the commission under this section shall be consistent with the public policy of this state as declared in the Highway Beautification Act and national standards promulgated pursuant to Title 23, United States Code.

C. The commission shall establish and collect uniform fees for the issuance of permits for outdoor advertising. The fees shall not be more than the actual cost to the commission of enforcement and administration of this act, or five dollars ($5.00) per year, whichever is greater, for each sign, display and device. All fees so collected shall be paid to the state treasurer for credit to the state road fund.

D. Any permit fee payable for the years 1966 through 1971 inclusive shall be deemed timely paid if, but only if, the fee is received by the commission prior to July 1, 1971. For the year 1972 and every year thereafter, the

permit fee shall be deemed timely paid if, said fee is received by the commission on or before the first day of the year for which said fee is being paid. Failure of timely payment of the permit fee for any outdoor advertising except those included in Subsections A(1), A(2) and A(3) of Section 67-12-4 N.M.S.A. 1978, shall render the outdoor advertising subject to removal by the commission without any compensation whatsoever and at the expense of the owner of the outdoor advertising.

67-12-6. Outdoor Advertising; Acquisition; Compensation; Removal.

A. The Commission may acquire by agreement or condemnation, all outdoor advertising and property rights pertaining thereto, and remove the outdoor advertising if the outdoor advertising, at the time of said acquisition;

(1) bears the requisite permit;

(2) has timely paid all permit fees, past and present, required in connection with the erection and maintenance thereof;

(3) conforms with standards, specifications and requirements contained in regulations promulgated by the commission; and

(4) was lawfully in existence on the effective date of the Highway Beautification Act [67-12-1 to 67-12-14 N.M.S.A. 1978] and has continued to so exist, or was lawfully erected subsequent to said effective date.

The condemnation shall be exercised by eminent domain in the manner provided by law, and each interested party shall have the right to a separate trial as to the respective interests involved.

B. Whenever outdoor advertising and property rights pertaining thereto are acquired by the commission pursuant to Subsection A of this section:

(1) the owner of the outdoor advertising shall be paid just compensation by the commission equal to the fair market value of the outdoor advertising which is to be deemed a trade fixture; and

(2) the owner of the land upon which the outdoor advertising is located shall be paid just compensation equal to the value of his right to have the outdoor advertising erected and maintained on the land.

C. The right to compensation as provided in Subsection B of this section shall not be affected solely by the failure of any outdoor advertising to conform to standards, specifications and requirements contained in regulations promulgated by the commission relating to any subject other than permits or permit fees unless the commission has given notice by certified mail to the owner of the land upon which the outdoor advertising is located, and to the owner of the outdoor advertising if his name appears thereon, advising of the failure to conform and ordering that the outdoor advertising be made to so conform or be removed within thirty days from the date of such notice. If the failure to conform is corrected within the said thirty days then the failure to conform shall be deemed cured for all purposes; if, however, the defect is not corrected within the thirty days, the commission may thereafter remove the outdoor advertising at the expense of the owner of the outdoor advertising without any compensation whatsoever. This subsection specifically does not apply in any manner to permit fees, and no notice whatsoever shall be required in connection with the permit fees.

D. Compensation shall not include any element of damages which is not subject to federal aid participation under the federal Highway Beautification Act of 1965, as has been or may be hereafter amended or superseded, or otherwise.

E. In any case where outdoor advertising has been removed under the Highway Beautification Act, and the removal is compensable under that act, but the commission has not paid just compensation or instituted condemnation proceedings therefor, the owner of the outdoor advertising, or the owner of the land upon which it is located, or both, may bring actions against the commission as provided in Section 42-1-23 N.M.S.A. 1978, for recovery of such compensation.

F. All outdoor advertising other than that meeting all the requirements of Subsection A of this section is declared to be a public nuisance and the contravention of law. Therefore and otherwise, the commission may remove or cause the removal of all outdoor advertising other than that meeting all the requirements of Subsection A of this section which removal shall be without any compensation whatsoever and at the expense of the owner of the outdoor advertising.

G. Removal of outdoor advertising by or at the request of the commission, its agents or employees, in compliance with the Highway Beautification Act, does not subject such removal or the persons performing it to criminal prosecution or give rise to any liability to any person or entity for the injury, loss or destruction of any property which occurs in connection with the removal.

67-12-7. Outdoor Advertising; Safety Rest Areas; Information Centers.

In order to provide information in the specific interest of the traveling public, the commission may authorize outdoor advertising at safety rest areas and at information centers.

* * *

67-12-12. Powers of Commission.

The commission may:

A. promulgate regulations it deems necessary to implement and enforce the Highway Beautification Act [67-12-1 to 67-12-14 N.M.S.A. 1978]; and

B. enter into agreements with the secretary of commerce pursuant to Title 23, United States Code, relating to the control of outdoor advertising and junkyards in areas adjacent to the interstate and primary systems, and to take action in the name of the state to comply with the terms of the agreements.

67-12-13. Construction of Act.

Nothing in the Highway Beautification Act [67-12-1 to 67-12-14 N.M.S.A. 1978] affects the provisions of any lawful ordinance or regulation which is more restrictive than the Highway Beautification Act.

67-12-14. Acquisition of Land for Scenic Beauty.

A. The commission may acquire and improve land necessary for the restoration, preservation and enhancement of scenic beauty within and adjacent to the interstate and primary systems, including acquisition for publicly owned and controlled rest and recreation areas and sanitary and other facilities within or adjacent

to the right-of-way and reasonably necessary to accommodate the traveling public.

B. The interest in land acquired and maintained under this section may be the fee simple or any lesser interest determined by the commission to be reasonably necessary to accomplish the purposes of the Highway Beautification Act [67-12-1 to 67-12-14 N.M.S.A. 1978]. The acquisition may be by gift, agreement, purchase, exchange, condemnation or otherwise. Acquisition through condemnation shall be in accordance with Sections 42-2-1 through 42-2-21 N.M.S.A. 1978.

C. Acquisition of any land under this section is for highway purpose.

APPENDIX B

EXCERPTS FROM THE NEW MEXICO OUTDOOR ADVERTISING RULES AND REGULATIONS (PROMULGATED PURSUANT TO THE AUTHORITY OF §67-12-5 N.M.S.A. (1978 COMP.))

* * *

1050.00 Definitions

* * *

22. "On-premise sign" means:

a. sign which advertises activities conducted on the property upon which the sign is located; and

b. is located within the area actually utilized for the purpose of the activity it advertises.

* * *

28. "Unzoned area" means an area which has not been zoned by a properly constituted zoning authority according to legally prescribed procedure.

29. "Unzoned commercial or industrial area" means any unzoned lands upon which there is located a bona fide commercial or industrial activity operating for at least six (6) continuous months of the year with a valid 12 months business license issued by a city, county or the state, whether or not a permanent structure is located thereon, and the area along the highway extending outward 1,000 feet from and beyond the edge of such commercial or industrial activity and extending perpendicular from the center line to a depth of 660 feet from the nearest edge of the right-of-way line on the same side of the highway as the commercial or industrial activity.

* * *

33. "Zoned industrial or commercial areas" means those areas which are reserved for business, commerce, trade, manufacturing, or industry, pursuant to a validly promulgated state or local ordinance or regulation.

1051.00 Classes of Signs Allowed

No outdoor advertising devices shall be erected or maintained except:

1. Directional and other official signs and notices.

2. Signs, displays, and devices advertising the sale or lease of specific properties upon which they are located.

3. On premise signs.

4. Signs, displays, and devices located within 660 feet of the nearest edge of the right-of-way in areas which are zoned as industrial or commercial under authority of law.

5. Signs, displays, and devices located within 660 feet of the nearest edge of the right-of-way in unzoned industrial or commercial areas.

6. Signs lawfully in existence on October 22, 1965, determined by the State Highway Commission, subject to any necessary federal approval, to be landmark signs of historic or artistic significance worthy of preservation including signs on farm structures or natural surfaces.

7. Signs lawfully in existence on the effective date of the Highway Beautification Act and which are continuing to exist.

APPENDIX C

23 U.S.C. § 131

§ 131. Control of Outdoor Advertising.

(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provisions for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to

such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this sections, (2) signs, displays and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on

October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the presevation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution of nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act [23 U.S.C.S. §§ 131 and notes, 135 note, 136, 319]. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs,

displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

(e) Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.

(f) The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. The Secretary may also, in consultation with the States, provide within the rights-of-way of the primary system for areas in which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary.

(g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the

right to erect and maintain such signs, displays, and devices thereon.

(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

(i) In order to provide information in the specific interest of the traveling public, the State highway departments are authorized to maintain maps and to permit information directories and advertising pamphlets to be made available at safety rest areas. Subject to the approval of the Secretary, a State may also establish information centers at safety rest areas and other travel information systems within the rights-of-way for the purpose of informing the public of places of interest within the State and providing such other information as a State may consider desirable. The Federal share of the cost of establishing such an information center or travel information system shall be that which is provided in section 120 for a highway project on that Federal-aid system to be served by such center or system.

(j) Any state highway department which has, under this section as in effect on June 30, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System shall be entitled to receive the bonus payments as set forth in the agreement, but no such State highway department shall be entitled to such payments unless the State maintains the control required under such agreement: *Provided,* That permission by a State to erect and maintain information displays which may be changed at reasonable intervals by electronic process

or remote control and which provide public service information or advertise activities conducted on the property on which they are located shall not be considered a breach of such agreement or the control thereunder[.] Such payments shall be paid only from appropriations made to carry out this section. The provisions of this subsection shall not be construed to exempt any State from controlling outdoor advertising as otherwise provided in this section.

(k) Subject to compliance with subsection (g) of this section for the payment of just compensation, nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section.

(l) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136, the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing

of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254 [128 U.S.C.S. § 1254]. If any part of an apportionment to a State is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

(m) There is authorized to be appropriated to carry out the provisions of this section, out of any money in the Treasury not otherwise appropriated, not to exceed $20,000,000 for the fiscal year ending June 30, 1966, not to exceed $20,000,000 for the fiscal year ending June 30, 1967, not to exceed $2,000,000 for the fiscal year ending June 30, 1970, not to exceed $27,000,000 for the fiscal year ending June 30, 1971, not to exceed $20,500,000 for the fiscal year ending June 30, 1972, and not to exceed $50,000,000 for the fiscal year ending June 30, 1973. The provisions of this chapter [23

U.S.C.S. §§ 101-144] relating to the obligation, period of availability and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this section after June 30, 1967.

(n) No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment.

(o) The Secretary may approve the request of a State to permit retention in specific areas defined by such State of directional signs, displays, and devices lawfully erected under State law in force at the time of their erection which do not conform to the requirements of subsection (c), where such signs, displays, and devices are in existence on the date of enactment of this subsection and where the State demonstrates that such signs, displays, and devices (1) provide directional information about goods and services in the interest of the traveling public, and (2) are such that removal would work a substantial economic hardship in such defined area.

(p) In the case of any sign, display, or device required to be removed under this section prior to the date of enactment of the Federal-Aid Highway Act [Amendments] of 1974 [Jan. 4, 1975], which sign, display, or device was after its removal lawfully relocated and which as a result of the amendments made to this section by such Act is required to be removed, the United States shall pay 100 per centum of the just compensation for such removal (including all relocation costs).

(q) (1) During the implementation of State laws enacted to comply with this section, the Secretary shall encourage and assist the States to develop sign controls and programs which will assure that necessary directional

information about facilities providing goods and services in the interest of the traveling public will continue to be available to motorists. To this end the Secretary shall restudy and revise as appropriate existing standards for directional signs authorized under subsections 131(c) and 131(f) to develop signs which are functional and esthetically compatible with their surroundings. He shall employ the resources of other Federal departments and agencies, including the National Endowment for the Arts, and employ maximum participation of private industry in the development of standards and systems of signs developed for those purposes.

(2) Among other things the Secretary shall encourage States to adopt programs to assure that removal of signs providing necessary directional information, which also were providing directional information on June 1, 1972, about facilities in the interest of the traveling public, be deferred until all other nonconforming signs are removed.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1233

STUCKEY'S STORES, INC., a Delaware Corporation, Individually and as a Representative on behalf of Its Franchisees in the State of New Mexico,

Appellant,

v.

FRED O'CHESKEY, Chief Highway Administrator, State Highway Department,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

RESPONSE TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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The Appellee moves the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the Supreme Court of New Mexico on the ground that the questions on which the decision of the cause depends have been decided by the Supreme Court of the State of New Mexico in accordance with the provisions of the United States Constitution and are so unsubstantial as to require no further argument or review by this Court.

ARGUMENT

I.

APPELLEE'S ARGUMENT THAT THE DECISION OF THE NEW MEXICO SUPREME COURT IS IN ACCORD WITH THE FIRST AMENDMENT IS PREMISED ON ITS MISCONCEPTION OF THE STANDARD TO BE APPLIED TO A STATUTE WHICH REGULATES SPEECH.

Appellee's argument in Point I of its Motion to Dismiss or Affirm relies on the basic premise that a legislative declaration of police power interests supporting a statute is to be accorded such weight that judicial review to determine whether such interests actually exist is precluded. Appellee relies on *Berman v. Parker*, 348 U.S. 26 (1954), as support for this proposition. This reliance is misplaced because of the essential difference between the type of judicial review which is accorded a statute when it is challenged under the due process clause of the Fourteenth Amendment and the type of judicial review accorded a statute which is challenged under the First Amendment. *Compare Berman* with *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977). *Berman* considered the ability of the government to exercise the power of eminent domain in connection with an urban redevelopment plan. The sole challenge in *Berman* was to the propriety of such action under the police powers doctrine; thus, *Berman* arose in the context of the due process clause. Faced with such a challenge this Court deferred to the legislative determination of the public interest.

This Court has, however, not applied the same mode of review to statutes which seek to regulate speech. In *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the state was required

to offer real justifications which would support the restriction on speech. In *Linmark* the regulation of speech would be allowed only if there was a showing that the impact of the speech would actually be detrimental. Both of these requirements are in keeping with the admonition that the state must do more than make a bare assertion that the regulation is justified. *Carey v. Population Services International,* 431 U.S. 678, 696 (1977).

Throughout this case the State has maintained the posture that it may rely on the analysis found in due process cases such as *Berman*. It did this at trial by refusing to offer evidence in support of the statute. It did this on appeal by successfully arguing that legislative declarations alone are sufficient to justify the Act. And here, by merely reviewing the New Mexico Supreme Court's decision and utterly ignoring the factual and legal hurdles set out in the Jurisdictional Statement, it implicitly admits that the decision is a legalistic shell devoid of factual substance. In order to scale these hurdles the State again stands on the claimed inviolability of legislative declarations as justification for the infringement of Appellants' right to speak. The validity of such a posture is belied by this Court's cases dealing with First Amendment issues. *Linmark; Virginia Pharmacy Bd.; Carey*.

For these reasons, the Appellee's argument in support of the New Mexico Supreme Court's decision is without merit.

II.

PRIOR CASES WHICH HAVE BEEN DISMISSED BY THIS COURT SHOULD NOT BE CONTROLLING ON THIS COURT'S ACTION ON THE CASE AT BAR BECAUSE OF SIGNIFICANT DIFFERENCES BETWEEN THOSE CASES AND THIS CASE.

The Appellee urges that this Court affirm or dismiss this appeal based on the prior decisions in *Markham Advertising Co. v. State,* 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed,* 393 U.S. 316 (1969); *Newman Signs, Inc. v. Hjelle,* 268 N.W.2d 741 (N.D. 1978),[1] *appeal dismissed,* 440 U.S. 901 (1979); *State v. Lotze,* 92 Wash. 2d 52, 593 p.2d 881, *appeal dismissed,* ___ U.S. ___, 100 S. Ct. 257, 62 L. Ed. 2d 177 (1979); *Suffolk Outdoor Advertising Co. v. Hulse,* 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263 (1977), *appeal dismissed,* 439 U.S. 808 (1978); *Veterans of Foreign Wars v. Steamboat Springs,* 575 P.2d 835 (Colo.), *appeal dismissed,* 439 U.S. 809 (1978). Each of these cases is distinguishable from the case at bar because of factual or legal differences.

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[1]The State asserts in n.4 that Stuckey's offered no evidence to disprove the existence of a relationship of billboards to traffic safety. This is untrue. Stuckey's cross-examined a State's witness on defendant's Ex. 8 and demonstrated the following facts: (a) of the total highway miles in New Mexico, only 5.6% are interstate and primary highways; (b) out of the total highway miles traveled in New Mexico on all highways, less than 50% of the travel is on interstate and primary highways; (c) on a per mile basis of travel, the interstate and primary highways are much safer than other state highways and roads to which the Act does not apply, that is, the percentage of accidents on a per mile basis of travel is much lower on interstate and primary highways. If the Act is a safety regulation, why does it apply only to the safest highways? On this evidence, the trial court found that the Act does not have a safety purpose and Appellant does not read the New Mexico Supreme Court's decision as having justified the Act on safety grounds.

Markham Advertising was decided before this Court's decision in *Bigelow v. Virginia,* 421 U.S. 809 (1975). In *Markham* the Washington Supreme Court placed great reliance on *Valentine v. Chrestensen,* 316 U.S. 52 (1942). More recent cases from this Court have recognized that *Valentine*'s suggestion that the Constitution poses no barrier to restraint on commercial speech is to be limited to the facts in *Valentine. See, e.g., Bigelow.* Indeed, the Washington Supreme Court has recognized that the doctrinal stance of *Markham* has been eroded by subsequent decisions of thi Court. *Lotze,* 593 P.2d at 813. Thus, any reliance by the Appellee on *Markham* as a basis for dismissing or affirming this appeal is misplaced. *See also General Outdoor Adv. Co. v. Dept. of Public Wks.,* 289 Mass. 149, 193 N.E. 799 (1935); *Ghaster Properties, Inc. v. Preston,* 176 Ohio St. 425, 200 N.E.2d 328 (1964).

As to the *Hjelle, Lotze,* and *Hulse* cases there is an important factual distinction to be made between the types of signs which were at issue in those cases and the type of sign which is at issue in the case at bar. In *Hjelle* the signs were those of an advertising company which rented the signs to various advertisers. In *Hulse* the nature of the signs was similar to that in *Hjelle.* In *Lotze* the signs conveyed the political or social ideas of the owners. In none of these cases were the signs those of a roadside business trying to advertise its local concern. This distinction is of importance in weighing the asserted governmental interest against the sign owner's First Amendment interest. It is crucial to the determination of whether the statute in question allows for an effective alternative to replace the prohibited form of speech.

An example illustrates the important difference between the types of signs. A billboard company may

use roadside signs to advertise shaving cream; however, shaving cream may be as effectively advertised by ads in magazines or in other media. The same cannot be said for the roadside business. An ad in a national magazine will be virtually useless to the store in Santa Rosa, New Mexico. A spot on national television will not reach the person driving through New Mexico on his summer vacation. This factual distinction between the content of the signs at issue in prior cases and the content of the signs at issue in this case is sufficient basis for distinguishing those prior cases. *See also Donnelly Advertising Corp. v. City of Baltimore,* 279 Md. 660, 370 A.2d 1127 (1977); *John Donnelly & Sons v. Mallar,* 453 F. Supp. 1272 (D. Me. 1978); *John Donnelly and Sons v. Outdoor Advertising Bd.,* 339 N.E.2d 709 (Mass. 1975).

The California Supreme Court recognized the difference between applying a sign prohibition to an advertising company and to an advertiser such as a roadside business. In *Metromedia, Inc. v. City of San Diego,* 23 Cal. 2d 762, 154 Cal. Rptr. 212, 592 P.2d 728 (1979), the court stated:

> In the present litigation which pits only the owners of the billboards against the city, individual advertisers are not parties; such an advertiser retains the ability to assert that, owing to the absence of reasonable alternative means of communication, the ordinance cannot *be applied* to prevent him from using a billboard to proclaim his message.

Id. at n.14 (emphasis in original).

In addition, the legal status of the cases on which Appellee relies is different from that of Appellant's case. The most obvious example of this is the *Veterans of Foreign Wars* case. Therein the sign owners challenged the city sign code as overbroad, vague, and a prior

restraint. No comparable issues are raised in the case at bar. It should also be noted that the *VFW* case involved a challenge to the facial validity of a sign code. Thus the evidence was limited to alleged facial defects in the code. 575 P.2d at 838. This is a very different type of challenge than was made in the case at bar at which Appellant presented evidence of concrete harm which would come to their business if their signs were lost. *See also Metromedia.*

In *Newman* the sign owner presented no evidence in support of his First Amendment claim. 268 N.W.2d at 761. The same must be said of *Howard v. State Dept. of Hwys. of Colorado,* 478 F.2d 581 (10th Cir. 1973), because of the procedural posture in which the case arose.

It can be seen that none of the cases on which the Appellee relies is comparable to the case at bar. In none was there a factual showing comparable to that in the case at bar. In none were the legal issues raised in the same manner as they were in the case at bar. For these reasons, Point II of Appellee's Motion to Dismiss or Affirm is not dispositive of this appeal.

CONCLUSION

For the reasons given in Appellant's Jurisdictional Statement and in this Response, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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